United States Court of Appeals

for the Second Circuit

APPENDIX

75-7600

United States Court of Appeals

For the Second Circuit

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
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CX 2, Exhibit No. 16

Certificate of Incorporation of Broadcast Music, Inc., dated 10/13/39.

CERTIFICATE OF INCORPORATION

of

BROADCAST MUSIC, INC.

Pursuant to Article Two of the
Stock Corporation Law

WE, the undersigned, desiring to form a stock corporation, pursuant to the provisions of Article Two of the Stock Corporation Law of the State of New York, do hereby certify as follows:

FIRST: The name of the proposed corporation is BROADCAST MUSIC, INC.

SECOND: The purposes for which it is to be formed are as follows:

A. To assist and advance the progress of radio broadcasting by the creation, selection and acquisition of meritorious musical and literary works, thereby promoting the cultural and creative arts for the ultimate enjoyment of the public.

B. To create, purchase, lease and otherwise acquire or obtain, and to own, hold, sell, lease, license, exchange and otherwise dispose of, musical, dramatico-musical, dramatic, literary, artistic and intellectual works of all kinds and types, and any or all copyrights, common-law rights and other rights therein.

C. To apply for, obtain, register, record, purchase, lease and otherwise acquire trade marks, trade names, licenses, copyrights, common-law rights and other rights to and in musical, dramatico-musical, dramatic, literary, artistic and intellec-

tual properties of all kinds, and to use, develop, sell, dispose of and grant licenses in respect of, and otherwise turn to account, any such trade marks, trade names, licenses, copyrights, common-law rights and other property rights.

D. To hire, employ, engage, contract with and otherwise transact business with, and to represent, manage and act as agents for, composers, authors, arrangers, artists, musicians, performers, publishers, producers, societies, associations, and all other types and kinds of persons for any and all purposes.

E. To adapt, arrange, translate, perform, print, reprint, dramatize, deliver, represent, produce, reproduce, exhibit, vend, license, record, copy and publish, musical, dramatico-musical, dramatic, literary, artistic and intellectual properties, and to circulate, distribute, buy, sell and otherwise acquire, dispose of, and deal in and with, sheet music, books, pamphlets, circulars, magazines, literature, pictures and other matter, and in any way to use and to license, permit, and otherwise authorize others to use, all or any of the foregoing.

F. To manufacture, make, produce, purchase, lease and otherwise acquire, and to sell, lease, license the use of, and in general, to deal in and with any and all electrical and mechanical sound records and other devices for the recording and reproduction of sound, and any and all films, records and other devices for the recording and reproduction of visual images.

G. To apply for, obtain, register, record, purchase, lease and otherwise acquire, and to hold, use and operate, and to sell, assign, license, and otherwise dispose of any patents, inventions, improvements and processes used in connection with or secured under letters patent of the United States or elsewhere, or otherwise; and to use, exercise, develop, and grant licenses in respect of and otherwise turn to account such patents, licenses, processes and the like, and any property or rights in connection therewith.

H. To create and produce radio and television broadcasting programs and other types and kinds of programs, entertainments, attractions and performances, and to present, furnish for hire, sell, and otherwise deal in and with respect to the same.

I. To enter into, make, perform and carry out contracts of every sort and kind, with any person, firm, association, corporation, private, public or municipal or body politic, and with the government of the United States, or any state, territory or colony thereof, or any foreign government.

J. To manufacture, purchase, or otherwise acquire, own, mortgage, pledge, sell, assign and transfer, or otherwise dispose of, to invest, trade, deal in and deal with goods, wares and merchandise and real and personal property of every class and description.

K. To acquire, and pay for in cash, stock, or bonds of this corporation or otherwise, the good will rights, assets and property of, and to lend money to, undertake or assume the whole or any part of the obligations or liabilities of, and otherwise assist, any person, firm, association or corporation engaged in the business of creating, publishing, distributing or marketing, musical, dramatico-musical, dramatic, literary, artistic and intellectual properties, or any rights therein, or engaged in the same or similar business as this corporation.

L. To the extent permitted by law, to invest its funds and to reinvest and keep the same invested in corporate stocks, bonds, debentures, notes, evidences of indebtedness, certificates of interest, commercial paper, mortgages, choses in action and other rights, interests or obligations issued or created by corporations, domestic or foreign (whether or not such other corporations shall be engaged in the same or a similar business as this corporation), associations, firms, syndicates, individuals, governments, states, municipalities or other political divisions, or issued or created by others, and to acquire the same by purchase or in any other manner, and to own, hold, sell, pledge, hypothecate, exchange or dispose of, and turn the same to account in any other manner and to deal in and with the same and to issue in exchange therefor or in payment thereof its own stocks, bonds, notes, participation certificates, or other obligations, or to pay for the same in any other manner, and to exercise in respect thereof any and all rights, powers and privileges of individual ownership or interest therein, including the right to vote thereon for any and all purposes, and to consent and to act in any other manner with respect thereto, and to do any and all acts and things for the preservation, protection, improvement and enhancement in value thereof or designed to accomplish any such purposes.

M. To borrow or raise money without limit as to amount and to issue bonds, debentures, or obligations of this corporation from time to time, for any of the objects or purposes of the corporation, and to secure the same by mortgage, pledge, deed of trust or otherwise.

N. To purchase, hold, sell and transfer the shares of its own capital stock and its own bonds, debentures or other obligations, secured or unsecured.

O. In general, to carry on any other similar business in connection with the foregoing, and to have and exercise all the powers conferred by the laws of New York upon corporations and so far as permitted by law to do any or all of the things hereinbefore set forth to the same extent as natural persons might or could do.

THIRD: The amount of capital stock shall be one hundred thousand dollars ($100,000.) consisting of one hundred thousand (100,000) shares of the par value of one dollar ($1.00) each, all of which are to be of one class.

FOURTH: At all elections of directors of the corporation, each stockholder shall be entitled to as many votes as shall equal the number of votes which (except for this provision as to cumulative voting) he would be entitled to cast for the election of directors with respect to his shares of stock, multiplied by the number of directors to be elected, and he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them, as he may see fit.

FIFTH: The office of the corporation shall be located in the City and County of New York, State of New York;

and the address to which the Secretary of State shall mail a copy of process in any action or proceeding against the corporation which may be served upon him, is Suite 1630, 165 Broadway, New York City.

SIXTH: The duration of the corporation shall be perpetual.

SEVENTH: The Board of Directors of the Corporation shall consist of not less than twelve, nor more than fifteen members, and the number of members authorized to serve shall be determined from time to time in the discretion of the Board of Directors. [April 6, 1948]

EIGHTH: The names and post office addresses of the directors, until the first annual meeting of the stockholders, are as follows:

NAMES	POST OFFICE ADDRESSES
Neville Miller	1626 K Street, N.W., Washington, D.C.
Walter J. Damm	333 West State Street, Milwaukee, Wis.
John Elmer	114 W. Lexington Street, Baltimore, Md.
Edward Klauber	485 Madison Avenue, New York City.
Lenox R. Lohr	30 Rockefeller Plaza, New York City.
Samuel R. Rosenbaum	Widener Bldg., Juniper and Chestnut Streets, Philadelphia, Penna.
John Shepard, 3rd	21 Brookline Avenue, Boston, Mass.

NINTH: The name and post office address of each subscriber to this Certificate of Incorporation and the number of shares of stock which each agrees to take are as follows:

NAME	POST OFFICE ADDRESS	NUMBER OF SHARES
Ruth M. O'Brien	165 Broadway, New York City	1
Cecile Brill	165 Broadway, New York City	1
Florence C. Cannor	165 Broadway, New York City	1

TENTH: All of the subscribers to this Certificate of Incorporation are of full age, at least two-thirds of them are citizens of the United States, at least one of them is a resident of the State of New York, and at least one of the persons named as a director is a citizen of the United States and a resident of the State of New York.

ELEVENTH: The Secretary of State of the State of New York is hereby designated as the agent of the corporation upon whom process in any action or proceeding against it may be served.

TWELFTH: A. No shares of capital stock of the corporation shall be sold, transferred or otherwise disposed of by any holder thereof (except that a stockholder who, at the time of such sale, transfer or other disposition, holds a license for the operation of a radio broadcasting station from the Federal Communications Commission or from such other Federal regulatory body as may hereafter have authority similar to that now had by the Federal Communications Commission, may sell, transfer or dispose of any shares of stock held by him to any other person to whom such license is legally transferred) un-

less and until the said shares of stock shall have been offered for sale to the corporation and the corporation shall have failed to acquire said shares in the manner hereinafter in this Article TWELFTH set forth, and the provisions of this Article TWELFTH shall be binding upon all persons acquiring shares of capital stock at any time and in any manner.

B. Any stockholder proposing to sell, transfer or otherwise dispose of any shares of stock held by him shall give notice to the corporation setting forth the number of shares involved in the proposed transaction, the nature of the transaction in detail, the names and addresses of all parties to such transaction, the price and terms upon which such sale, transfer or disposition is proposed to be made, and the name and address of a person designated by such stockholder to act as an appraiser in the event that the corporation shall elect to have an appraisal as hereinafter provided. The foregoing notice shall constitute an offer to sell such shares to the corporation on the terms and conditions set forth in this Article TWELFTH.

C. Within ten (10) days after the receipt by the corporation of the notice provided for in Section B of this Article TWELFTH, the corporation shall give notice to the said stockholder whether or not it elects to have the value of said shares appraised or the book value thereof determined, or both, as hereinafter in this Article

TWELFTH provided, and in the event that the corporation shall elect to have the value of said shares appraised, said notice shall contain the name and address of a person designated by the corporation to act as an appraiser.

D. In the event that the corporation shall elect to have the value of said shares appraised, the two appraisers designated as aforesaid shall within ten (10) days after the giving of the notice referred to in Section C of this Article TWELFTH, jointly designate a third appraiser, and in the event that such third appraiser shall not be so designated within said time, either the stockholder or the corporation may request the American Arbitration Association to designate a third appraiser in accordance with its rules and regulations then prevailing. The three appraisers so designated shall meet and shall proceed at the principal office of the corporation, as promptly as shall be practicable, to appraise the value of said shares as of the date of the receipt by the corporation of the notice provided for in Section B of this Article TWELFTH, and for the purposes of such determination they shall exclude the goodwill and going-concern value of the corporation. The decision of a majority of such appraisers shall be conclusive, and notice of such decision shall promptly be given to the stockholder and to the corporation. The stockholder shall pay the fees and expenses of the appraiser designated by him, and the corporation shall pay all other costs of the appraisal including the fees and expenses of

the appraiser designated by the corporation and of the third appraiser.

E. In the event that the corporation shall elect to have the book value of said shares determined, the corporation, within ten (10) days after it gives the notice provided for in Section C of this Article TWELFTH, shall designate independent certified public accountants (who may be the independent certified public accountants regularly retained by the corporation) to determine the said book value, and such accountants, as promptly as practicable, at the expense of the corporation and in accordance with good accounting practice, shall determine the book value of such shares as of the date of the receipt by the corporation of the notice provided for in Section B of this Article TWELFTH, excluding for the purposes of such determination the goodwill and going-concern value of the corporation. Notice of such determination shall promptly be given to the stockholder and to the corporation by the said accountants.

F. The corporation, within twenty (20) days after the receipt by it of the notice required to be given under Section B of this Article TWELFTH, or of the receipt by it of the notice of the decision of appraisers under Section D of this Article TWELFTH if the corporation shall have elected to have an appraisal, or of the receipt by it of the notice of determination of book value under Section E of this

Article TWELFTH if the corporation shall have elected to have book value determined (whichever shall be received latest) shall give notice to the stockholder by which, if any, of the three methods provided in this Article TWELFTH the corporation shall elect to acquire the said shares. If the corporation shall elect to acquire the said shares, the stockholder shall promptly after the receipt of the notice of such election deliver to the corporation the certificate for the said shares, properly endorsed for transfer, and the corporation shall make payment for said shares promptly after the delivery of said certificate, unless the basis upon which the corporation acquires said shares shall be on the terms of an offer specified in accordance with Section B of this Article TWELFTH which does not require payment on or promptly after delivery of the certificate, in which case payment shall be made in the manner set forth in the notice given under Section B of this Article TWELFTH.

C. In the event that the corporation shall fail to acquire said shares in accordance with the provisions of Section F of this Article TWELFTH, the stockholder may sell, transfer, or otherwise dispose of the number of shares of stock specified in the notice given under Section B of this Article TWELFTH, such sale, transfer or other disposition to be to the parties specified in said notice, upon the price and terms specified in the said notice, and in accordance with the detailed nature of the transaction specified in said notice, and

not otherwise; provided, however, that such sale, transfer or other disposition shall be consummated and the stock certificate sent to the corporation for transfer on the books of the corporation within one year after the giving of the notice provided in Section B of this Article TWELFTH.

H. All notices permitted or required to be given to the corporation under this Article TWELFTH shall be mailed to the corporation by registered mail addressed to it at its principal place of business, and all notices permitted or required to be given to the stockholder under this Article TWELFTH shall be mailed to the stockholder by registered mail addressed to him at his address appearing on the books of the corporation.

THIRTEENTH: No contract or other transaction between this corporation and any other corporation shall be affected or invalidated by reason of the fact that any one or more of the directors of this corporation is or are interested in, or is a director or officer of, or are directors or officers of, such other corporation, and any director or directors, individually or jointly, may be a party or parties to, or may be interested in, any contract or transaction of this corporation, or in which this corporation is interested; and no contract, act or transaction of this corporation with any one or more persons, firms or corporation shall be affected or invalidated by the fact that any director or directors of this

corporation is a party, or are parties, to or are interested in such contract, act or transaction, or are in any way connected with such persons, firms or corporations, or any of them, and each and every person who may become a director of this corporation is hereby relieved from any liability that might otherwise exist from contracting with the corporation for the benefit of himself or any firm, association or corporation in which he might be in any way interested.

IN WITNESS WHEREOF, we have made, signed and acknowledged this certificate this 13th day of October, 1930.

Ruth M. O'Brien (L.S.)

Cecile Brill (L.S.)

Florence G. Cannastra (L.S.)

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State of New York } ss.:
DEPARTMENT OF STATE }

I CERTIFY That I have compared the preceding copy with the original Certificate of Incorporation of

BROADCAST MUSIC, INC.,

filed in this department on the 14th day of October, 1939, and that such copy is a correct transcript therefrom and of the whole of such original.

WITNESS my hand and the official seal of the Department of State at the City of Albany, this fourteenth day of October, one thousand nine hundred and thirty-nine.

Deputy Secretary of State.

Form 85. 4-3-39-10,000 (2-7458)

E 385

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

On this 13th day of October, 1939, before me personally came RUTH M. O'BRIEN, CECILE BRILL and FLORENCE G. CARRIER, to me known and known to me to be the individuals described in and who executed the foregoing certificate of incorporation, and they severally duly acknowledged to me that they executed the same.

Ruth E. Morris
Notary Public

RUTH E. MORRIS, Notary Public
Kings Co. Clk's No. 225, Reg. No. 345
N. Y. Co. Clk's No. 636, Reg. No. 0-M-435
Commission expires March 30, 1940

CBS v. ASCAP E 386

Court Exhibit No. 3

Stipulation between CBS and BMI in CBS v. ASCAP, dated 10/15/71 ("SO ORDERED 10/26/71").

E 387

OFFICE COPY ONLY

USDISTRICT COURT
OCT 26 1971
S.D. OF N.Y.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff, -against- AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., Defendants.	(M.E.L.) 69 Civ. 5740
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., Defendants-Counterclaimants, -against- COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff-Counterdefendant, NATIONAL BROADCASTING COMPANY, INC., Counterdefendant.	STIPULATION AND ORDER

WHEREAS, the defendants represented by the undersigned attorneys do not concede that the matters referred to in paragraph 2 of the following stipulation have any relevance or materiality in this action, but are willing to enter into said stipulation in the interests of achieving an early trial of the liability issues raised by the complaint herein,

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned as follows:

1. The following definitions shall apply to paragraph 2 hereof:

(a) ASCAP: American Society of Composers,

Authors and Publishers.

(b) ASCAP members: authors, composers and publishers who are members of ASCAP, and trusts, estates, foreign licensing organizations and other persons who qualify to receive distributions from ASCAP under ASCAP's distribution system.

(c) ASCAP repertory: that body of musical compositions as to which ASCAP has the rights to grant non-exclusive licenses for non-dramatic public performance for profit.

(d) BMI: Broadcast Music, Inc.

(e) BMI affiliates: authors, composers and publishers who are affiliated with BMI, and trusts, estates, foreign licensing organizations and other persons who qualify to receive distributions from BMI under BMI's distribution system.

(f) BMI repertory: that body of musical compositions as to which BMI has the rights to grant non-exclusive licenses for non-dramatic public performance for profit.

(g) CTN: plaintiff's television network.

(h) Public performance right: the right to give a non-dramatic public performance of a musical composition for profit.

2. Any judicial determination made in this action concerning:

(a) the practicability or impracticability of plaintiff or the suppliers of CTN programming obtaining directly from ASCAP members public performance rights to music in the ASCAP repertory for any, some or all of such programming, or

(b) the extent to which those rights not

practicably obtainable directly from ASCAP members are essential to plaintiff in order to enable it to compete with other television networks,

shall also be deemed a determination with respect to, and shall also be binding on, the parties represented by the undersigned in respect of:

(c) the practicability or impracticability of plaintiff or the suppliers of CTN programming obtaining directly from BMI affiliates public performance rights to music in the BMI repertory for any, some or all of such programming, and

(d) the extent to which those rights not practicably obtainable directly from BMI affiliates are essential to plaintiff in orde. to enable it to compete with other television networks.

October 15, 1971.

CRAVATH, SWAINE & MOORE,

by _____
A member of the firm
Attorneys for Plaintiff

HUGHES, HUBBARD & REED,

by Amalya L. Kearse
A member of the firm
Attorneys for Defendants
Broadcast Music, Inc., Al Gallico Music Corp., Paul Anka, Jerry Bock, Fred Ebb, Edward B. Marks Music Corp., Norman Gimbel, Sheldon Harnick, Hill and Range Songs, Inc., Hollis Music, Inc., John Kander, Charles Koppelman, Maclen Music, Inc., Peer International Corporation, Don Rubin, Joseph Stein, Sunbeam Music Corp., and Unart Music Corp.

SO ORDERED: 10/25/71

/s/ Morris E. Lasker
U.S.D.J.

CBS v. ASCAP

Plaintiffs' Exhibit No. 12

Finkelstein Affidavit dated 6/25/70 in U.S. v. ASCAP (NBC Application).

Pl. Ct 12 for Jd 7

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UNITED STATES DISTRICT COURT OFFICE COPY ENTERED

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	Civil Action No. 13-95
-against-	:	
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,	:	AFFIDAVIT IN OPPOSITION TO NBC's APPLICATION FOR A LICENSE FOR 2217 SPECIFIED COMPOSITIONS AND CERTAIN BACKGROUND MUSIC LIBRARIES
Defendant.	:	
In the Matter of the Application of NATIONAL BROADCASTING COMPANY, INC.,	:	
Applicant,	:	6/25/70
For the Determination of Reasonable License Fees for Its Television Network	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

HERMAN FINKELSTEIN, being duly sworn, says:

1. I am General Counsel of the American Society of Composers, Authors and Publishers ("ASCAP" or the "Society"), and am fully familiar with all the proceedings herein.

2. Applicant National Broadcasting Company, Inc. ("NBC") is seeking a determination that ASCAP is required to grant it, pursuant to the Amended Final Judgment herein (Exhibit 1 hereto), an unprecedented license to perform on its television network only 2217 specified compositions and certain background music libraries contained in the ASCAP repertory. ASCAP opposes granting such a license because it is barred from granting it under the Amended Final Judgment and under the antitrust laws generally and because

such a license would, if granted, enable NBC to use its market power illegally to impose improper and unreasonable costs and operating methods upon all members of ASCAP, and to drive down the price paid by it to independent composers, authors and publishers for performance rights to their music.

3. The type of license NBC now seeks is completely unprecedented in the licensing of musical compositions by ASCAP to NBC and the two other national television networks. Without exception NBC has previously requested and ASCAP has previously issued the "blanket license" for the NBC television network provided in the Amended Final Judgment. Under that license NBC is given the right freely to use any, some or all compositions in the ASCAP repertory at a fee which is related to NBC's charges to sponsors of all programs. The blanket license is one of two licenses provided for broadcasters under the Judgment, the other being a "per program" license under which the fee is related only to charges to sponsors of those programs in which compositions in the ASCAP repertory are performed. Both types of licenses grant the right to perform all works in the ASCAP repertory The "blanket license" has the asset of encouraging performances based on the intrinsic value to the listening public of the music selected, unhampered by difficulties of negotiations for any individual work or performance, and requiring a minimum of bookkeeping.

4. When the Amended Final Judgment was entered, no broadcaster or network had ever requested ASCAP to issue a license for an individual composition and there was no reason to believe at that time that any such request would ever be made. The "per program" license provided for in the Judgment was intended to benefit individual stations that expected to use relatively few ASCAP compositions, but that license also covered the entire ASCAP repertory.

5. NBC's initial application, made in its letter to ASCAP dated October 14, 1969, specifically asked "for the right of public performance of all the compositions in the ASCAP repertory" for the five year period following the expiration of its then current license on December 31, 1969. In reply, ASCAP explained the reasons why rates could not yet be quoted and confirmed that NBC had the right to perform such compositions for a 60-day period beginning January 1, 1970. Copies of NBC's application and ASCAP's reply are annexed hereto as Exhibits 2 and 3.

6. While the parties were discussing NBC's application and the information necessary to quote rates, ASCAP received a letter from NBC dated March 10, 1970. This letter did not indicate whether NBC was still interested in the license it had requested on October 14, 1969. After noting that it did "not accept" the position that additional factual information was necessary to quote rates, NBC requested a unique and unprecedented license for the right to perform "approximately 2,217 compositions and certain background music libraries" which NBC had selected from the ASCAP Index and which it "conclude[d]" would satisfy its needs for a five-year period. A copy of that letter is annexed hereto as Exhibit 4.

7. ASCAP responded by letter dated March 17, 1970, a copy of which is annexed hereto as Exhibit 5. Pointing out that the preservation of each member's right to deal directly with users who sought licenses on an individual basis was an underlying principle of the Amended Final Judgment, ASCAP suggested that any request for the quotation of a "fee" with respect to specified compositions be addressed to the respective ASCAP members in interest. With respect to NBC's request of October 14, 1969 for a license

covering the entire repertory, ASCAP quoted a rate formula for the year 1970 and pointed out that the quotation of a fee for a license on a blanket basis for a period of years, and on a per program basis (a basis which NBC and ASCAP had never previously used), would require certain specified information similar to data which NBC had made available to ASCAP in 1965 in connection with an earlier rate proceeding.

8. After the expiration of its license from ASCAP on December 31, 1969, NBC continued to have the right to perform all of the compositions in the ASCAP repertory by virtue of its October 14, 1969 application and the provisions of the Amended Final Judgment. On January 29, 1970, ASCAP filed an application under the Judgment for an interim fee to be paid by NBC for the right to perform ASCAP music from January 1, 1970. It was not until NBC's application of March 27, 1970 for an interim fee that NBC for the first time notified ASCAP that it "hereby withdraws and cancels its application of October 14, 1969 [the subject of ASCAP's interim fee application] . . . and affirmatively avers that it does not want a blanket license." That withdrawal came after NBC had been granted the right to perform the compositions in the ASCAP repertory for 60 days after January 1, 1970 and after ASCAP had made a written offer to extend that right for another 60 days to May 1, 1970. Further, the NBC application sought an order (a) setting an interim fee and requiring ASCAP to quote a fee relating to performance which is neither provided for by the terms of the Amended Final Judgment nor permitted under the antitrust laws generally, and (b) directing ASCAP to inform its members of the request, a course which is contrary to the terms and

spirit of the Judgment.

9. Despite its purported withdrawal of its application for a license to perform all the compositions in the ASCAP repertory, NBC did not inform this Court in its application for an interim fee based upon the right to perform only 2,217 compositions that it was continuing to avail itself of the right to use the entire ASCAP repertory -- a right resulting from the application it had purported to withdraw. It was only after ASCAP called the Court's attention to the fact that NBC was using numerous ASCAP compositions in addition to those specified in its list of 2,217 compositions, that NBC admitted that it was not confining its use of ASCAP music to those specified compositions. A copy of the relevant portion of ASCAP's submission to the Court establishing NBC's use of such additional ASCAP compositions is annexed hereto as Exhibit 6. After being confronted with the facts, NBC then abruptly changed its position before the Court. Rather than continuing to claim that the 2,217 compositions on its list would satisfy its needs, NBC admitted that it would be necessary for it to obtain the rights to perform additional compositions and that it proposed to obtain such rights either through ASCAP or directly from the writers and publishers involved.

10. NBC subsequently filed an application dated May 13, 1970, asking the Court to direct ASCAP to offer NBC the license it seeks for approximately 2,217 compositions and certain background music libraries and to determine a reasonable fee for such a license. Unlike its application

for an interim fee, NBC did not request an order directing ASCAP to inform the members in interest of the type of license it was seeking.

11. At a hearing requested by NBC and held June 2, 1970, the Court separated the issues relating to the amount of an interim fee from the issues of NBC's application for a license for 2,217 compositions and certain background music libraries in the ASCAP repertory. The Court first noted that NBC had continued to use the ASCAP repertory without limitation, suggested an interim fee based on such unlimited use, and also suggested a further option to NBC: if NBC decides to limit its use to the approximately 2,217 specified compositions and certain background music libraries listed in its application and gives ASCAP 20 days' notice of such intent and keeps records proving that it actually so limited its use, and further if ASCAP is ultimately required to issue the limited license requested, then any retroactive adjustment of the interim fee upward or downward will take account of such limited use. Both NBC and ASCAP subsequently accepted the Court's suggestion (Tr. 43-46). The Court further noted that it would proceed to decide the question of NBC's right to the license requested and, pointing out that the papers then before it dealt with both the amount of the interim fee and NBC's asserted right to compel ASCAP to issue a limited license (Tr. 15-16), requested the parties to exchange and submit further papers limited to the latter question (Tr. 46-47).

12. ASCAP submits that it would be entirely improper for the Court to require it to issue the "nucleus" license for approximately 2,200 compositions. Apart from the

matters of law set forth in the accompanying memorandum, numerous practical problems preclude the issuance of such a license. For example, NBC has had difficulty articulating the procedures it would follow if it actually received a license for only some 2,217 compositions in the ASCAP repertory. At the hearing before this Court on April 1, 1970, counsel for NBC, in response to inquiry by the Court (Tr. 54-55), stated that NBC would seek additional licenses through applications to ASCAP for the right to perform new ASCAP compositions not included in the list of 2,217 compositions (Tr. 55). ASCAP's memorandum of April 15, 1970 pointed out (pp. 12-13) that such a procedure would impose an impractical burden of continuous applications on both the Court and ASCAP.

13. NBC subsequently represented to the Court that it proposes to conduct negotiations for new ASCAP compositions, as well as negotiations for existing compositions not on its list but nevertheless played on its network, directly with the individual owners of the copyrights, except in the "one instance" of any such compositions it has performed from January 1, 1970 until the time its present demands for a limited license are resolved. In that so-called "one instance", NBC now says it may seek a license from ASCAP and petition the Court, if necessary, to set a fee for its use of such additional compositions. The fact is, of course, that NBC's "one instance" could involve determination of a fee for hundreds of compositions and impose a great burden on this Court.

14. In addition to practical problems, the NBC

proposals in their present formulation would seriously prejudice the position of independent writers and publishers. The NBC television network is composed of (a) the five stations which it owns and operates and which are located in certain of the largest television markets in the country, together with (b) approximately 200 additional affiliated stations, serving virtually every other community across the country, which are owned, and licensed by the Federal Communications Commission ("FCC") for operation, by others but which are in fact tied to the network through affiliation contracts, thus giving NBC access for all its programs to substantially all American homes equipped with receiving sets. In addition, the NBC television network produces and procures programs, arranges for sponsorship, and supplies a continuous, coordinated schedule for its affiliated stations.

15. Each of the 200 individual stations which have been combined to constitute the NBC television network places its most valuable broadcasting time, the evening hours when television audiences are largest ("prime time"), at the disposal of NBC. Each is the holder of a monopoly right to broadcast over a particular channel granted by the FCC pursuant to statute. Since the 200 stations effectively refrain from telecasting programs during prime hours other than network programs, and NBC produces and procures virtually all their programs, a determination by NBC not to license the public performance right to any individual composition in effect means that this particular composition will not be performed on any of the 200 affiliated NBC stations during the hours of greatest public exposure. Unless a writer or composer is able to have his composition performed during

those hours by the television networks he will lose the benefit of the largest public entertainment medium in the country.

16. Despite NBC's protestation that it is seeking to give the ASCAP members the opportunity to act individually, its new shift in direction further makes clear that its proposed 2,217 compositions license is a power move to drive down the price for performance rights, based on its control of more than 200 affiliated television stations. NBC intends to deny access to all 200 stations during prime time if the composer, author or publisher of a particular work refuses to accept the price and terms dictated by NBC. NBC's power, as a result of its control of its affiliated stations' prime time, is such that the FCC has sought to alleviate the situation in the public interest by requiring NBC, as well as the other networks, to yield one hour of prime time daily for local programming (FCC Docket No. 12782, Report and Order adopted May 4, 1970).

17. Using the power given to the individual stations by statute and license and to NBC by those stations, NBC seeks to limit its "nucleus" to some 2,217 compositions and represents that, except for the "one instance," it will negotiate with the individual ASCAP members for a license for the compositions which it has excluded from its "nucleus" and those which will be written from time to time in the future. NBC describes that type of negotiation as governed by free market forces. In fact, such negotiations would really be between NBC acting collectively for its 200 affiliates with great bargaining power deriving from its power

to control the programs seen on the prime time of the 200 stations on the one hand, and individual writers and publishers with little or no bargaining power or organization on the other. Rather than being governed by free market forces with a willing buyer facing a willing seller on equal bargaining terms, the negotiations NBC proposes will have a network with the power to foreclose its "market" dealing with an individual having no choice but to license his composition at the fee and terms NBC chooses or lose the opportunity for public performance on the NBC network, one of the three national television networks.

18. Moreover, NBC is seeking the aid of this Court in furtherance of its attempted use of its power to drive down the price paid for the right to perform musical compositions on its television network. NBC now proposes to avoid the Court's function under the Amended Final Judgment to determine reasonable fees for licenses by giving individual members in interest a choice of dealing individually with the network on the network's terms or facing a boycott of their works in the most desirable program periods on every station represented by the network. In order to allow it to drive down prices for additional compositions, NBC needs the assurance that it will have a nucleus of compositions available at a fee set by the Court. If NBC has that assurance plus the right to compel writers and publishers to deal individually for additional compositions, NBC's power to fix prices and terms will become absolute.

19. NBC has sought to justify such use of its monopoly power to force down the price of music on the ground

that the service performed by ASCAP is unnecessary and involves unwarranted overhead and other costs. That statement is directly contrary not only to experience but to statements previously made in this Court by the Chairman of the Board of Directors and General Counsel of Broadcast Music, Inc. ("BMI") -- the corporation organized by NBC itself, together with other broadcasters, to acquire performance rights collectively for the broadcasting industry. Sydney M. Kaye, a member of the law firm then serving as counsel for CBS, was designated by NBC and CBS to organize BMI and to direct its operations. Mr. Kaye's affidavit, sworn to June 5, 1965, and filed in United States of America v. Broadcast Music, Inc., 64 Civ. 3787, points out:

> "Performance rights organizations perform necessary economic functions for both the creators and users of music. If there were no performance rights organizations, each broadcaster or other performance right user would have to obtain the necessary license from the copyright owner of each composition. Since each user utilizes thousands of compositions, the administrative cost of acquiring licenses for any one user would be prohibitive. Similarly, the administrative cost, to the thousands of copyright owners of music, of granting licenses to thousands of users, and of detecting unauthorized usages, would be prohibitive." (par. 6)

In addition, if licensing were on the basis of individual works licensed by individual writers and publishers, the individuals would have to be in a position to undertake the function now performed by ASCAP and BMI of indemnifying users against claims for copyright infringement or their works would not be accepted by broadcasters for performance on their stations. This has been the practice of the networks, and it was confirmed in Mr. Kaye's affidavit, which continued:

> "Performance rights organizations also indemnify users against claims for copyright infringement. In the absence of such organizations, broadcasters and other users would have to depend upon the undetermined financial responsibility of thousands of different copyright owners, and the resulting risk of liability for infringement (17 U.S.C. § 101) would inhibit the use of music of small publishing enterprises and comparatively unknown writers." (par. 7)

20. The fact is, of course, that NBC has no intention at all of dispensing with the service performed by ASCAP as a central clearing house for performing rights. It seeks in this proceeding to avail itself of the convenience and protection that would be afforded it by a single license from ASCAP covering its so-called "nucleus" of 2,217 compositions and certain background music libraries. But the existence and machinery of ASCAP -- an unincorporated association of approximately 16,000 members -- cannot properly be utilized by a bulk user of music to acquire performing rights to a limited number of works in which a small fraction of ASCAP's membership has any interest. There are only 1,007 writers having an interest in the 2,217 compositions included in NBC's list for which it demands a license from ASCAP in this proceeding. ASCAP has 12,107 writer-members. Similarly, only 318 publishers have any interest in the works on NBC's list. ASCAP has a total of 4,113 publisher-members. All of ASCAP's members share the cost of providing ASCAP's services designed to license the entire repertory for the benefit of all members. NBC's suggestion that those same services be used to license 2,217 compositions to benefit only a small fraction of ASCAP's members would unjustly prejudice the majority of ASCAP members who, having no interest in the 2,217 compositions, nevertheless share

the cost of operating ASCAP. This cost would be increased by the novel licensing and policing procedures inherent in NBC's scheme.

21. In addition to seriously prejudicing the rights of the vast majority of ASCAP members whose works are not included in NBC's list of 2,217 compositions, the license requested by NBC would be unworkable. Whatever NBC's intentions may be with respect to limiting the compositions the public may hear on its programs, NBC does not assert that it will compel such stars as Dean Martin, Herb Alpert and Andy Williams to limit their television performances to the songs as NBC's list, nor does NBC say that it proposes to dictate all uses of music on the NBC network regardless of the performers' requirements.

22. The "Tonight Show" presents a particular problem with respect to limiting the selection of compositions, because the audience selects some of the compositions performed on that program. A feature of the "Tonight Show" has been a section called "Stump the Band," during which Johnny Carson invites members of the audience to suggest song titles -- any song titles -- they believe the band and other regulars on the "Tonight Show" will not recognize. Those compositions are then performed by the band or the particular member of the audience. The "Tonight Show" is recorded on the day of telecast. Live performances present a similar problem. NBC broadcasts live football games which include bands entertaining by performing marches and other compositions. Presumably, NBC now has no prior control over the songs chosen by "Tonight Show" audiences or members of the

bands. Unless NBC chooses either to limit the audience members on the "Tonight Show" and the bands playing at football games to its 2,217 compositions list, or to delete from the network programs of that nature, how would NBC obtain the performance rights to compositions not included in its list? Clearly there would not be enough time for NBC to approach either ASCAP or the members in interest and negotiate a license for such spontaneous or live performances.

23. Finally, the record should be clear that there is no basis for the statement made by the Department of Justice in its Memorandum of June 12, 1970 (p. 4) that ASCAP will "apparently" refuse to license individual compositions if requested to do so by NBC and the member in interest. Under Section VI of the Amended Final Judgment, ASCAP may issue a license in those circumstances. ASCAP must treat each such request on an individual basis with due regard to the interests and rights of its individual members as well as the public interest.

Sworn to before me this
25 day of June, 1970

Notary Public

HENRY ROTSCHUSTER
Notary Public, State of New York
No. 03-6011300
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 30, 1972

E 405

CBS v. ASCAP

Plaintiffs' Exhibit No. 14

Finkelstein Affidavit, dated 7/10/70 in U.S. v. ASCAP (NBC Application).

PX - 17
For I.D.
4/14/71 W. S.

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E 406

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Defendant.

- -

In the Matter of the Application of NATIONAL BROADCASTING COMPANY, INC

Applicant,

For the Determination of Reasonable License Fees of Its Television Network.

- x

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Entered		
Civil Action	13-95	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

HERMAN FINKELSTEIN, being duly sworn, says:

1. I have previously submitted an affidavit, sworn to June 25, 1970, in opposition to the application of National Broadcasting Company, Inc. ("NBC") for a license for 2,217 specified compositions and certain background music libraries. I make this affidavit in response to statements made in the affidavits of Lawrence J. McKay and Aaron Rubin, both sworn to June 26, 1970, submitted on behalf of NBC.

2. NBC argues that American Society of Composers, Authors and Publishers ("ASCAP" or the "Society") was tardy in replying to NBC's letter application of October 14, 1969 and that the Society's responses to that application were incomplete because the Society (a) sought further information

it needed in order to quote the fees for NBC then requested and (b) quoted a fee for a blanket license for a one-year period rather than for a per program license or for a five-year period. (McKay Aff't, sworn to June 26, 1970, pars. 3-11). The fact is that ASCAP quoted the only fee it was able to quote as promptly as possible in the circumstances and that NBC has consistently sought to evade disclosing up-to-date information which would enable ASCAP to quote reasonable rates based on pertinent knowledge.

3. Following the October 14 application NBC and Columbia Broadcasting Systems, Inc. ("CBS") were attempting to upset the final arrangements they had made with ASCAP for the license for their respective television networks for the period ending December 31, 1969. This Court had approved, by orders dated April 15 and 28, 1969 and entered on consent of CBS and ASCAP and NBC and ASCAP, respectively, agreements relating to the licenses for the CBS and NBC television networks for the period ending December 31, 1969. Despite the order of April 15, CBS refused to make payment to ASCAP. In December 1969 CBS and ASCAP entered a modified version of the April agreement eliminating clauses which had become academic. Following this Court's order dated January 12, 1970 approving that modified version of the ASCAP agreement with CBS, NBC moved to resettle the April 28 order by a motion dated January 14, 1970 which was denied by order dated January 26, 1970. In February 1970, although the time to appeal from the April 28, 1969 order had passed, NBC filed a notice of appeal to the Court of Appeals for the Second Circuit, by which it purported to appeal from the order of January 26, 1970 denying its motion to resettle the April 28, 1969 order and from the order of Janu. 12, 1970

which related solely to the license for the CBS television network. A copy of that notice of appeal is annexed hereto as Exhibit A. NBC has to date failed to prosecute that appeal.

4. In my letter of December 23, 1969 I stated to NBC that the Society was then unable to quote the fees requested because of the position CBS and it had taken in respect of the agreements for the period ending December 31, 1969. In addition, the Society was seriously handicapped by a lack of relevant information which only NBC could -- and would not -- supply. The prior NBC licenses were on a blanket basis with the fee as a percentage of NBC's receipts from sponsors for broadcasting facilities, except in the agreement for the period ending December 31, 1969 where the fee was a flat dollar amount. To quote a fee for a future period for a five-year blanket license or for the untried per-program license required up-to-date information from NBC. The information ASCAP subsequently requested from NBC corresponded to the information ASCAP had requested during the course of the prior proceeding to fix a rate for the NBC television network. At that time NBC permitted the Society to review many of its pertinent records and obtain the needed information. That review was conducted by two ASCAP representatives and was completed in seven weeks with no disruption of NBC's operations.

5. The information required by ASCAP in order to quote a rate for the current period was not forthcoming. Instead NBC applied for a novel license for 2,217 compositions and certain background music libraries. (McKay aff't par. 8)

6. The statistics purportedly designed to demonstrate that the use of the compositions in the ASCAP repertory

on the NBC television network has declined in recent years (Rubin Aff't, sworn to June 26, 1970, pars. 3-6) are neither relevant to the issue of whether NBC is entitled under the Amended Final Judgment to the limited license it seeks, nor reliable. While I do not believe it appropriate to attempt to determine at this time the extent of the use of ASCAP compositions, I shall respond briefly.

7. Based on information supplied by NBC to ASCAP, it appears there has been no such decline in performances of ASCAP works by NBC as suggested by Mr. Rubin. The NBC figures are based on what NBC calls "FCC composite weeks" for the years 1965/66 through 1968/69 (Rubin Aff't, par. 4). Mr. Rubin gives no reason for choosing a composite week or for choosing 1965/66 as his base for comparison. Use of a selected period, rather than a full year, has the danger of emphasizing non-recurring or unique situations which do not significantly affect statistics for a whole year. Furthermore, the fact is that the period 1965/66 was unusual. It was one in which NBC had substantially more feature performances of ASCAP compositions than in prior and subsequent periods. As a result Mr. Rubin's figures lead him to an erroneous conclusion.

8. Rather than select a so-called "composite week", I have had prepared the following figures which reflect NBC performances during ASCAP's entire fiscal survey years which begin October 1 of the preceding calendar year and end September 30 of the calendar year. Thus, the 1964 fiscal survey year runs from October 1, 1963 through September 30, 1964. The following feature uses of ASCAP compositions were made by the NBC television network during the indicated fiscal survey years:

Fiscal Survey Years	No. of Feature Uses
1964	6,745
1965	15,333
1966	10,386
1967	7,739
1968	6,904
1969	6,793

Thus using entire years instead of selected "composite weeks", between 1964 and 1969, feature use of ASCAP music by the NBC television network has been constant, except for unusually large uses in the fiscal survey years 1965 and 1966 -- the years which correspond to the NBC composite week 1965/66 used by Mr. Rubin as the starting point for his analysis (Rubin Aff't, par. 4).

9. Mr. Rubin also refers to uses other than feature uses (Rubin Aff't, par. 5). The following is a list of total credits on which the Society's members receive payment, recorded by the Society's survey, based on performances by the NBC television network. Again, the credits produced by the survey have been fairly constant, except for the unusually high levels in the 1965 and 1966 fiscal survey years.

Fiscal Survey Year	Total Performance Credits
1964	4,450,041
1965	5,297,931
1966	4,949,780
1967	4,490,518
1968	4,253,911
1969	4,390,675

10. Finally, Mr. Rubin attempts to combine his statistics for feature and other uses by a weighted formula giving feature uses 14 times as much weight as other uses -- a formula purportedly based on ASCAP's "pay-out" formula"

used in compensating its members (Rubin Aff't, par. 6). The 14-to-1 "pay-out formula" NBC suggests does not correspond in any respect to the formula used by ASCAP in compensating its members. There is no such ratio nor any basis for computing one. Annexed hereto as Exhibit B is a booklet containing this Court's order of January 7, 1960 and the applicable rules: the Weighting Rules (Attachment C as amended) and the Weighting Formula. These rules are the best evidence of the distribution formula and it can readily be seen that they do not contain any 14-to-1 "pay-out formula".

11. Moreover, any analysis purporting to show a decline in the value of a license based on a decline in actual number of performances is meaningless unless it takes into consideration such factors, among others, as the type of use, the number of stations in the network hook-up and the amounts paid by sponsors. The fact is that NBC's claim of a decline in network performances of ASCAP works is not supported by the facts.

12. In my earlier affidavit (pars. 21-22) I noted that the license NBC requests would be unworkable because it would require that NBC dictate the compositions which might be performed regardless of the performers' desires. NBC purports to be untroubled by the problems of obtaining individual licenses for compositions which are not on its list and as to which it may have only limited advance notice (Rubin Aff't, par. 16). In contrast to NBC's broadly asserted confidence that live programs, and presumably all others, do not present significant problems, and consistent with the statements in my earlier affidavit, NBC's competitor CBS has presented

detailed representations in another matter before this Court outlining the difficulties it would encounter if it did not have the unlimited right to use any composition in the BMI repertory, and by analogy, in the ASCAP repertory, at any time.

13. The CBS statements have been made in an action brought by it against both ASCAP and BMI, S.D.N.Y. 69 Civ. 5740, in which CBS claims a right to a so-called "per use" license, pursuant to which it would be allowed to use any composition in the ASCAP repertory but would pay only for the uses actually made. NBC is a counterdefendant and has appeared in the action. The statements were made in papers filed by CBS this week in opposition to BMI's motion for a preliminary injunction requiring CBS to pay it an interim fee.

14. An affidavit sworn to July 7, 1970 by Donald Sipes, CBS Vice President of Business Affairs and Planning, is directed, in part, to showing that the rights to a large volume of music in the BMI repertory are indispensable to the CBS television network's programming and that those rights are not obtainable in practice from composer and publisher members individually. Although Mr. Sipes' affidavit, by nature of the motion to which it is addressed, speaks only of music in the BMI repertory performed on the CBS television network, it illustrates how the limited license NBC seeks from ASCAP would force NBC in the operation of its network to dictate which compositions may be performed and even to censor compositions already performed on pre-recorded broadcasts to the detriment of independent writers and publishers and the viewing public.

15. Mr. Sipes describes four reasons music would be unavailable for performance by the CBS television network

absent a license allowing for blanket availability of the repertory (par. 6):

> "(a) the lack of any advance notice of its use (such as on sports and public affairs programs, in which music is often performed spontaneously, or variety shows, in which it is sometimes 'ad-libbed'); (b) the receipt of such short advance notice as not to permit direct negotiations for performing rights; (c) the extreme problems of identifying, locating and negotiating with numerous composers or publishers even when longer notice is given; and (d) a collection of other operational difficulties relating to particular types of programs which may best be described in connection with the following discussion regarding music selection in each programming category."

16. Mr. Rubin has informed the Court (Rubin Aff't, par. 16) that the music played by bands during sports events "is determined in advance and licenses may be obtained for any music performed" and that "[t]he same is true in the case of other news broadcasts such as parades, political conventions, etc."

17. Those conclusions are directly contradicted by Mr. Sipes' affidavit. Annexed hereto as Exhibit C is a copy of the relevant portion of that affidavit, paragraph 11. Mr. Sipes there states:

(a) with respect to sports events, (par. 11(a)) that many of the songs performed during the half-time of football games "are performed without notice, particularly those compositions played while games are in progress."

(b) with respect to parades (par. 11(b)), that bands performing in parades "[a]s often as not . . . perform unlisted music at that time [when the band passes the CBS mobile unit]. New bands are also added to the parade without notice, and loudspeakers on floats reach our sound equipment."

(c) with respect to news broadcasts (par. 11(c)), that musical compositions are performed without advance notice:

> ". . . a military band may be playing while the President reviews the troops; an interview may take place at an airport at which music is being played in the background over a wired music service or protest marchers may sing 'freedom songs'. . . ."

(d) with respect to political conventions (par. 11(d)), that the phenomenon of spontaneous performances at political conventions is not unfamiliar, since "delegations not uncommonly burst into song, particularly during demonstrations," and songs other than those supplied in advance to CBS are performed.

Herman Finkelstein

Sworn to before me this
10th day of July, 1970

James Pollock

JAMES POLLOCK
Notary Public, State of New York
Residing in Kings County
Kings Co. Clk's No. 24-9404030
Certificate Filed in
New York Co. Clk's
Commission Expires March 30, 19 72

CBS v. ASCAP

Plaintiffs' Exhibit No. 24

Excerpts from ASCAP Brief on Appeal, dated 3/30/71, United States v. ASCAP (Matter of Zekley).

* * *

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United States Court of Appeals

For the Second Circuit

71-1200

UNITED STATES OF AMERICA,

Plaintiff,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Defendant-Appellee,

GARY ZEKLEY, EDDIE BRANDT,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Issues Presented for Review

Appellant Zekley, joined belatedly by appellant Brandt, are two of the approximately 16,000 members of American Society of Composers, Authors and Publishers ("ASCAP"). They seek reversal of orders below which held that ASCAP must distribute to its members license fees received in 1970 for prior years in the manner required by the antitrust consent decrees in this action which have governed the ASCAP distributions for at least 20 years.

Judge Sylvester J. Ryan, who as Rule 2 Judge has supervised ASCAP's distribution pursuant to those consent decrees for the last 15 years, also noted that the distribution

he ordered was consistent with ASCAP's practices since the entry of the 1960 Order implementing the consent decree and determined that there is "no other fair, reasonable or just distribution" (Appellants' App. 333-338*)

Appellants contend that the distribution ordered below is "unjust, inequitable and inconsistent" (Appellants' Brief 24), basing their argument on the fallacious assumption that ASCAP is required to distribute fees to members whose compositions were performed in the years to which the fees relate, even though there is no such requirement to be found in the detailed distribution system set forth in the consent decrees, and such a distribution might be so expensive and impractical as to be deterimental to ASCAP's function.

Appellants specifically seek a ruling (1) that Judge Ryan erroneously enjoined prosecution of a California State court action which sought an order requiring a totally different distribution and thereby threatened to interfere with the consent decrees herein which provide in detail for distribution of license fees to ASCAP's members, and (2) that Judge Ryan erroneously interpreted the language of his own order of January 7, 1960 entered herein on consent of plaintiff, United States of America, and ASCAP, after a hearing on notice to the ASCAP members, in directing that ASCAP distribute fees received in 1970 for prior years on the same basis as, and as part of, the fourth regular distribution for 1970.

In addition to the merits of the distribution order, there are two procedural issues to be considered.

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* Appellants requested that they be relieved of the requirement of transmitting and docketing the record and by order of March 15, 1971 Appellee was allowed to file its own appendix containing those portions of the record not included in Appellants' appendix. The Appellants' appendix is cited "Appellants' App. " and the Appellee's appendix "Appellee's App. A- ".

First, although the appeals from the order directing the distribution purport to be taken as of right, neither Zekley nor Brandt is a party or moved to intervene as a party to this action or to the 1960 Order. Moreover, Zekley is not aggrieved by the distribution directed by Judge Ryan's order, and Brandt's claim to be aggrieved is unsubstantiated in the record.

While the separately noticed appeals from the distribution order and the order enjoining prosecution of the California action are being heard together without objection by ASCAP (even though no motion to consolidate was made), the joint hearing is specifically, by order of Judge Feinberg, without prejudice to ASCAP's motion, renewed herein, to dismiss the appeals from the distribution order for lack of standing.

Second, although Zekley and Brandt claim to represent a class of other members "similarly situated", Judge Ryan determined after hearing argument that no class was represented by Zekley and Brandt. No two members (other than co-writers of the same composition) have the same interest in any distribution. Although Zekley purported to bring his California action also on behalf of a "class", no determination that a class exists was made in that action and, as shown in Point II *infra*, no class exists under California law. Furthermore, the record indicates that Zekley would probably benefit by Judge Ryan's order and, therefore, is not a proper representative of a class of members allegedly aggrieved by that order.

If the merits of the distribution order are reached, Judge Ryan's ruling must be affirmed. Appellants' basic argument—that license fees paid to ASCAP relating to a past period must be distributed as a matter of "fairness" to those members whose musical compositions were performed during the same period—finds no support in the ASCAP membership agreements, Articles of Association or the 1960 Order, and neither fairness nor practicality requires that ASCAP distribute on any such basis.

The ASCAP operation has two separate, and interrelated, systems which must be distinguished.

On the one hand, users pay license fees for the right to perform any, some or all of the compositions in the repertory at any time during the license period. Those fees are usually agreed to prior to the time when the choice of compositions is to be made.

On the other hand, the 1960 Order requires that the fees received from those users by ASCAP be distributed on the basis of the performance of compositions in the "most recent available" period. At present, the "most recent available" period ends six months prior to the quarter in which the distribution is made and, as a result, may or may not include performance credits earned by performances in the same period for which some or all of the fees being distributed are paid.

Although appellants argue that the compositions performed "earned" the fees and the fees must, therefore, be distributed to the members whose works were performed during the license period, the ASCAP distribution system, for very practical reasons, does not provide for any such exact relationship between fees and performances. Nothing in the consent decrees allows ASCAP to deviate from that distribution plan for the fees here in issue.

Moreover, any system which would require ASCAP to apportion fees received for past periods (as opposed to those received for the current period) on the basis of the performances of that past period would increase the expense of the distribution so that any "fairness" to any particular member might well be offset by the loss of income to the membership at large resulting from the extra expense.

The final issue presented is the propriety of Judge Ryan's order enjoining further prosecution of the California action. That action sought an order requiring a distribution different from that mandated by the 1960 Order. The com-

plaint filed therein did not even inform the California court that ASCAP's distribution is governed by the consent decrees in this action. Judge Ryan properly restrained Zekley and Brandt from further prosecution of that action on the ground that, pursuant to 28 U.S.C. § 2283, such an injunction was necessary to protect the consent decrees herein (Appellants' App. 315-325, 355-356).

Statement of the Case

To aid the Court to determine the issue of the correct distribution of license fees received by ASCAP in 1970 for prior years, a brief description follows of ASCAP and its operation under the consent decrees in *U.S.* v. ***ASCAP***, the manner in which the fees here in issue were received, the decision of ASCAP's Board of Directors not to seek to amend the 1960 Order, and the subsequent proceedings below.

The Origins and Function of ASCAP*

ASCAP is an unincorporated association whose members are composers, authors and publishers of musical compositions.** It was organized in 1914 by Victor Herbert and other well-known writers and publishers of that day to enforce the copyright law provisions relating to the nondramatic public performance of musical compositions for profit that had been in effect for some 17 years. Before ASCAP was formed, an individual composer or publisher

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* Questions involving the licensing of the right to perform the compositions in ASCAP's repertory have been before this Court and we respectfully refer the Court to Judge Friendly's opinions in *United States* v. *American Society of Composers, Authors and Publishers* (*Shenandoah Valley Broadcasting, Inc.*), 317 F.2d 90 (2d Cir. 1963) and 331 F.2d 117 (2d Cir. 1964).

** Judge Smith has succinctly described ASCAP in his opinion in *United States* v. *American Society of Composers, Authors and Publishers* (*Metromedia*), 341 F.2d 1003, 1005 (2d Cir. 1965).

* * *

1970 basis by the same piece of paper does not give Appellants standing to appeal. Zekley was brought before Judge Ryan only to stay the California action (Brandt came before Judge Ryan on his own initiative) and not because he had any standing to be heard on the proper basis for the distribution. Although Judge Ryan heard Zekley's, and subsequently Brandt's, arguments as "friends of the court", no right to appeal was thereby granted.

ASCAP does not challenge the right of appellants to appeal from the order enjoining further prosecution of the California action. Zekley and Brandt, however, cannot gain standing to appeal from the distribution order because it is being heard together with their appeals from the injunction.

The order enjoining further prosecution of the California action is justified under 28 U.S.C. § 2283 to protect and effectuate the judgments of the Southern District Court. If that California action, or similar suits were allowed, they would threaten varying adjudications making it difficult, if not impossible, for ASCAP to distribute license fees in the future under the consent decrees herein and frustrate the antitrust policy effected thereby.

POINT I

The Consent Decrees And Articles Of Association Require The Distribution On The Basis Of The "Most Recent Available" Data.

The Amended Final Judgment of 1950 and the 1960 Order together with the ASCAP Articles of Association create a comprehensive scheme for the ASCAP distribution —specifying the manner in which performances are to be surveyed, the computation of distributable revenue and precisely which period of performances is to be used in al-

locating distributable revenue to the ASCAP members. Zekley and Brandt would ignore those detailed provisions and argue that there is some requirement that all ASCAP distributions (including distributions of fees for current periods as well as fees for past periods) be made on the basis of the performances during the years for which the license fees to be distributed are paid (Appellants' Brief 11 ff.).

At the outset, the fallacy of Appellants' argument is demonstrated by the manner in which fees received for a current period are distributed. The regular ASCAP distribution, which is not challenged herein, does not attempt to equate, nor is there any requirement that it attempt to equate, the fees received for any license period with the performances of members' compositions during the same period.

The regular distribution to the ASCAP members is required to be, and always is, a distribution of fees currently received on the basis of performances which appear in the ASCAP survey for the "most recent available" past period (Appellants' App. 32UU, 32DD, 32HH, 32JJ).* Since April 1968 (Appellants' App. 32 UU) the "most recent available" period (i) for writers has been and is the four fiscal survey quarter years ending two quarters (six months) prior to the beginning of the quarter in which the distribution is made, and (ii) for publishers has been the fiscal survey year ending the September 30th prior to the April distribution. Distributions are made in January (or the preceding December), April, July and October (Appellants' App. 32 TT).

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* Although 80% of the distribution to writers on the Four Fund Plan is made on the basis of funds other than the Current Performance Fund and is based on distributions for earlier years (Appellants' App. 32 Q-R, DD-GG), sixty percent of the 80% is based on the member's average performance credits during the *"latest available preceding* five fiscal survey years" (Appellants' App. 32 DD-EE; emphasis supplied).

For example, the distribution in December 1970 to writers electing the Current Performance Option and of 20% (Current Performance Fund) of the distribution to writers on the Four Funds Plan was made on the basis of the four fiscal survey quarter years ending March 31, 1970 (the last three quarters of 1969 and the first quarter of 1970). Similarly the distribution to publishers in April 1971 (the end of the publisher distribution year at which time the payments on account made during the past three quarters are adjusted to conform to data for the full fiscal year) will be based on the data of performances for the fiscal survey year October 1, 1969 through September 30, 1970.

While the data of performances on which the distribution is based are for a period ending two quarters prior to the quarter of distribution, the fees comprising the distributable revenue generally are received during the quarter just prior to the date of distribution—or, as was the case with the $9,920,000 because of the time necessary for the Board to determine whether to seek an amendment, an additional quarter may elapse prior to the quarter of distribution. The distribution, therefore, will include fees paid for various periods, but the distribution will be based on the data of performances for the "applicable", *i.e.*, "most recent available" period. In no event is there any requirement that ASCAP relate the fees distributed to data of performances for the periods for which the fees were paid.

The purported basis for appellants' argument is the language of Section XI of the Amended Final Judgment (Appellants' Brief 11). As noted above, that provision, which requires ASCAP "to give primary consideration to performances . . . as indicated by objective surveys", superseded the prior distribution system which was based on an subjective evaluation of the worth of the catalog of each member (*supra* at 8).

That provision, however, does not require that the performances which are "primarily" considered be the per-

formances in the period for which the fees are paid. Rather, ASCAP applies that provision by basing each distribution on the data of performances for the "most recent available" applicable year or quarters as specified in the 1960 Order.

Appellants then seek to rely on the provisions in the 1960 Order which require ASCAP to apply "economic multipliers" to a scientific sample of the performances of the compositions of its members by the various media to give the proper relative value to performances by each of those media (Appellants' Brief, 12; Appellants' App. 32 O-Q). But the purpose of that requirement is to enable the Society to distribute fees to its members on a basis which recognizes the relative contribution to the entire ASCAP license fee collections made by the various media. Again, nothing in that provision supports the argument that performances in any period "earn" the fees for that period.

Appellants next refer to the distribution of receipts from foreign performing rights societies as a supposed "extremely analogous" situation (Appellants' Brief 13-14). Pursuant to Section III (L) of the 1960 Order (Appellants' App. 32U), ASCAP is directed to distribute receipts from any affiliated foreign society up to $200,000 on the basis of the most reliable information ASCAP has as to foreign performances generally. If the revenue from any such source is in excess of $200,000, and to the extent that the reports furnished to ASCAP by such source allocate credit in reasonably identifiable form separately by compositions performed and identify the members in interest, such revenue is to be distributed on the basis as reported by such foreign source.

The purpose and effect of the provision are not, as appellants claim, to "go back" to "previous years", but to allow the distribution of the foreign fees at a justifiable cost. When the fees are small they are distributed on the basis of reliable information about foreign performances generally. Only when the fees are larger does ASCAP look to foreign performances from the particular society making

the payments and then only if the reports furnished are in a specified form. But when it looks to this performance data, nothing requires the Society to make any attempt to relate the period of the performance to the period for which the fees are paid.

Appellants' argument that the distribution of fees for past periods was not considered by the Court and the parties when the 1960 Order was entered (Appellants' Brief 14-15), is contrary to the facts available at the time of the entry of the 1960 Order.

When the 1960 Order was entered, the Court and the parties were aware of the provisions in the 1950 Amended Final Judgment providing for retroactive adjustment of an interim fee (Appellants' App. I). Such a retroactive adjustment, upward or downward, must relate to past periods. Since the 1960 Order does not provide any different manner in which such retroactive adjustments are to be considered, either for the purpose of distribution or for making a refund, it must be concluded that the parties and the Court desired to treat those fees or refunds in the same manner as current fees or refunds.

Appellants purport to analyze the distribution system of the 1960 Order and then ask what is the "applicable" fiscal year (for publishers) or four fiscal survey quarter years (for writers in relation to "current performances) (Appellants' Brief 15-20). The answer to which periods are "applicable" appears in the Writers Distribution Formula, requiring that the "applicable" period be the "most recent available" fiscal survey quarter years (Appellants' App. 32 UU.)*

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* The Appellants' argument would require the applicable period to be the prior eight years—1962-1969. Every relevant provision in the 1960 Order is inconsistent with that argument. The current writers' distributions are based on *"applicable four fiscal survey quarter years"* (Appellants' App. 32DD, HH) and the publishers' on the "applicable fiscal survey *year"* (Appellants' App. 32JJ). Where the applicable period is more than one year, as to the other 80% of the Four Fund Plan the period is either the *"latest available preceding five* fiscal survey years" or any 10 year period (Appellants' App. 32DD-FF).

Although that provision applies specifically only to the Current Performance Fund of the Four Funds Plan, the same "most recent available" period is the "applicable" period for distribution to all other members.

Writers electing the Current Performance Option receive their distributions under identical language to that governing the distribution to the writers from the Current Performance Fund, *i.e.*, the "applicable preceding four fiscal survey quarter years" (Appellants' App. 32 DD *cf.* 32 HH).

The publisher distribution language is similar, except that a full year—with quarterly payments on account finally adjusted in the April quarterly distribution each year—instead of four quarter years is considered. The 1960 Order requires that all publishers receive a "Current Performance Payment" made on the basis of credits recorded "for the applicable fiscal survey year", which is the year from October 1 to September 30 (Appellants' App. 32 JJ).

To determine which period is "applicable" for writers electing the Current Performance Option or for publishers, reference is made to the detailed provisions of the Writers Distribution Formula.

Since Appellants do not challenge the distribution of fees for the current period—as to which there is no attempt to relate fees to performances in the periods for which the fees are paid—the argument to which Appellants are reduced is that the size of the distribution, $9,920,000, is so significant that some other extraordinary method of distribution is needed, despite the fact that nothing in the consent decrees allows ASCAP to deviate from the specific language therein.

The $9,920,000 distribution, however, is not really large in comparison to other ASCAP distribution data.

To start with, the $9,920,000 is the sum of two payments, from different licensees. The payments from CBS and

ABC, before expenses and deductions to foreign societies, were less than $7 million and over $4 million, respectively. In 1969 ASCAP distributed $3 million, received from NBC in that year for prior years, on the same basis as the other distributions for 1969 and no objection was made.

Second, as Judge Ryan noted in his opinion, the refunds and adjustments for past years are "comparable to the sums now available to be disbursed" (Appellants' App. 335; see Appellants' App. 143).

Even assuming *arguendo* and contrary to Judge Ryan's finding, that the size of the $9,920,000 is itself significant, there is still no basis for the claim that ASCAP must equate fees for one period with the performances for the same period. The concept of the consent decrees is directly contrary to that claim. Their underlying concept is that the distribution be made, as Judge Ryan held, "of necessity . . . upon a current receipt basis" (Appellants' App. 338).

Moreover, the notion underlying the argument that ASCAP must equate performances in one period with the fees paid for that period is that the fees are in some manner "earned" by the performances during the period. That underlying assumption has no validity whatsoever. In order to expose the fallacy of that argument, there follows a brief discussion of the ASCAP licensing system directed to the question of what "earns" the fee.

The ASCAP licensee agrees to pay for the right to perform any, some or all compositions in the ASCAP repertory (Appellants' App. 3[illegible], not for the performance of certain compositions. Since ASCAP and the licensee generally agree on a fee prior to the occasions on which the performances occur or, indeed, the compositions to be performed are chosen—or, in many instances, prior to the time the compositions are even written—it is thoroughly wrong to assert that the subsequent performances "earned" the

fee. Rather, the entire ASCAP repertory, representing the present and future compositions of present and future members, "earned" the fee.

The fallacy of the notion that subsequent performances "earn" fees is highlighted by the fact that the ASCAP repertory changes after the date on which the fee is agreed.

Pursuant to their membership agreements, the ASCAP members authorize ASCAP to license their compositions which may "hereafter" be written or published by them as well as the compositions already written or published (Appellants' App. 147).

Furthermore, the compositions of a member who joins ASCAP after the licensee and ASCAP agree on a fee also become part of the repertory available for performance by the licensee.

As a result, the licensee may perform compositions during the period of his license which were not in the repertory at the time he agreed on a fee with ASCAP.

While the ABC and CBS license fees were in part set prior to the time of performance (the interim fee) and paid in part after the license expired (the additional $9,920,000), ABC and CBS, like all other licensees, paid for the availability of the ASCAP repertory, not the performances of particular compositions. The fact that a portion of the final fee paid by CBS and ABC was not received until 1970, after the period of their licenses, does not mean that the prior performances "earned" those fees. For example, since the CBS fee was agreed on by CBS and ASCAP in 1966, approved by the Court by an Order dated April 15, 1969 and paid in 1970, only the payment of the fee occurred after the license period.

Moreover, the provisions of the Amended Final Judgment that describe the basis on which ASCAP is required to license radio and television stations and networks make it clear that the performance of compositions is not

the relevant criterion. Section VII of the Amended Final Judgment sets forth two types of license which ASCAP may issue, "blanket" or "per program" (Appellants' App. 32G). Neither the blanket nor the per program license fee is related to the performance of compositions.*

Since the fees for the entire repertory licensed by ASCAP are paid for the availability of the entire ASCAP repertory, not for the performance of the individual compositions, it is appropriate that the distribution be made, as Judge Ryan ordered, on a basis which is designed to give primary consideration to performances but does not attempt to equate the performances with the fees paid for any particular period.

POINT II

No Appeal Has Been Noticed On The Class Issue And, In Any Event, Each Member Of ASCAP Is Affected Differently By Each Different Distribution. Zekley And Brandt Cannot Properly Represent A Purported Class Of Members.

Neither Zekley nor Brandt has noticed an appeal from Judge Ryan's determination that no class action exists (Appellants' App. 239, 241). Appellants nevertheless ask this Court to hold that "no proper determination of the class action status of appellants has been made" (Appellants' Brief 42). Without a notice of appeal this Court has no jurisdiction even to consider the issue. See Rule 3 F. R. App. P. In any event, as will be shown hereafter, Judge Ryan correctly determined that no class exists.

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* ASCAP is not allowed to grant a license for the performance of one or more specified compositions unless both the user and member or members in interest have requested ASCAP to do so (Amendment Final Judgment Sec. VI) (Appellants' App. 32F-G). Each ASCAP member, however, reserves the right to grant individual licenses (Sec. IV(B)) (Appellants' App. 32-D).

* * *

E 430

CBS v. ASCAP

Plaintiffs' Exhibit No. 53

AGAC Uniform Popular Songwriters Contract, bearing copyright dates: 1948 (SPA) and 1969 (AGAC).

E 431

AMERICAN GUILD OF AUTHORS & COMPOSERS

PX Ex 53 for id. Aug. 16, 7

Authorized for use by.....

.....

under agreement dated.....19..... and Not Valid

Unless Countersigned by AGAC

UNIFORM POPULAR SONGWRITERS CONTRACT

Copyright ©1948 Songwriters Protective Ass'n.
Copyright ©1969 AGAC.

AGREEMENT made this day of , 19 , between

.....

(hereinafter called "Publisher") and.....

.....

Jointly and/or severally hereinafter collectively called "Writer");

WITNESSETH:

Composition 1. The Writer hereby sells, assigns, transfers and delivers to the Publisher a certain heretofore unpublished original musical composition, written and/or composed by the above-named Writer now entitled

(hereinafter referred to as "the composition"), including the title, words and music thereof, and the right to secure copyright therein throughout the entire world, and to have and to hold the said copyright and all rights of whatsoever nature thereunder existing, for the original term of the United States copyright or for the period of twenty-eight years from the date of publication in the United States, whichever may be shorter, and subject to the terms of this contract.

Performing Rights Affiliation 2. In all respects this contract shall be subject to any existing agreements between any of the parties hereto and the small performing rights licensing organization of which Writer is a member or an affiliate.

Warranty 3. The Writer hereby warrants that the composition is his sole, exclusive and original work, that he has full right and power to make the within contract, and that there exists no adverse claim to or in the composition, except as aforesaid in Paragraph 2 hereof and except such rights as are specifically set forth in Paragraph 23 hereof.

Royalties 4. In consideration of this contract, the Publisher agrees to pay the Writer as follows:

Advance (a) $.....as an advance against royalties, receipt of which is hereby acknowledged, which sum shall remain the property of the Writer and shall be deductible only from payments hereafter becoming due the Writer under this contract.

Piano Copies (b) In respect of regular piano copies sold and paid for in the United States and Canada, a royalty per copy according to whichever one of the following provisions is checked:

Fixed Royalty ☐ (i) .....¢ (in no case less than 3¢ per copy.)

Sliding Scale ☐ (ii) .....% (in no case, however, less than 14½%) of the wholesale selling price of the first 100,000 copies or less, but in no event less than 2½¢ per copy; plus

.....% (in no case, however, less than 14%) of the wholesale selling price of copies in excess of 100,000 and not exceeding 200,000, but in no event less than 3¢ per copy; plus

.....% (in no case, however, less than 16%) of the wholesale selling price of copies in excess of 200,000 and not exceeding 300,000, but in no event less than 3½¢ per copy; plus

.....% (in no case, however, less than 18%) of the wholesale selling price of copies in excess of 300,000 and not exceeding 400,000, but in no event less than 4¢ per copy; plus

.....% (in no case, however, less than 20½%) of the wholesale selling price of copies in excess of 400,000 and not exceeding 500,000, but in no event less than 4½¢ per copy; plus

.....% (in no case, however, less than 23%) of the wholesale selling price of all copies in excess of 500,000, but in no event less than 5¢ per copy.

Foreign Royalties (c) .....% (in no case, however, less than 50%) of all net sums received by the Publisher in respect of regular piano copies, orchestrations, band arrangements, octavos, quartets, arrangements for combinations of voices and/or instruments, and/or other copies of the composition sold in any country other than the United States and Canada, provided, however, that if the Publisher should sell such copies through, or cause them to be sold by, a subsidiary or affiliate which is actually doing business in a foreign country, then in respect of such sales, the Publisher shall pay to the Writer not less than 5% of the marked retail selling price in respect of each such copy sold and paid for.

NOT AUTHORIZED FOR USE BY AGAC UNLESS COUNTERSIGNED

THIS IS SOLD

Orchestrations and Other Arrangements, etc.

(d) ..... % (in no case, however, less than 10%) of the wholesale selling price (after trade discounts if any) of each copy sold and paid for in the United States and Canada, or for export from the United States, of orchestrations, band arrangements, octavos, quartets, arrangements for combinations of voices and/or instruments, and/or other copies of the composition (other than regular piano copies).

Publisher's Song Book, Song Sheet, Folio, etc.

(e) (i) If the composition, or any part thereof, is included in any song book, song sheet, folio or similar publication issued by the Publisher containing at least four, but not more than twenty-five musical compositions, the royalty to be paid by the Publisher to the Writer shall be an amount determined by dividing 10% of the wholesale selling price (after trade discounts, if any) of the copies sold, among the total number of the Publisher's copyrighted musical compositions included in such publication. If such publication contains more than twenty-five musical compositions, the said 10% shall be increased by an additional ½% for each additional musical composition. The composition shall not, however, be included in any such publication earlier than six months after the date on which regular piano copies of the composition shall have been published, except that said six months period may be reduced to three months with the Writer's written consent given at any time after the expiration of three months.

Licensee's Song Book, Song Sheet, Folio, etc.

(ii) If, pursuant to a license granted by the Publisher to a licensee not controlled by or affiliated with it, the composition, or any part thereof, is included in any song book, song sheet, folio or similar publication, containing at least four musical compositions, the royalty to be paid by the Publisher to the Writer shall be that proportion of 50% of the gross amount received by it from the licensee, as the number of uses of the composition under the license and during the license period, bears to the total number of uses of the Publisher's copyrighted musical compositions under the license and during the license period. The lyrics alone of the composition may be included in such a publication at any time, but the lyrics and music thereof, in combination, shall not be included earlier than two years after the date on which regular piano copies of the composition shall have been published. Such royalties shall be computed and paid within 30 days after the expiration of the term of each license, but if any such license term is in excess of one year, such royalties shall be computed and paid annually.

(iii) In computing the number of the Publisher's copyrighted musical compositions under subdivisions (i) and (ii) hereof, there shall be excluded musical compositions in the public domain and arrangements thereof and those with respect to which the Publisher does not currently publish and offer for sale regular piano copies.

(iv) Royalties on publications containing less than four musical compositions shall be payable at regular piano copy rates.

Professional Material and Free Copies

(f) As to "professional material" not sold or resold, no royalty shall be payable. Free copies of the lyrics of the composition shall not be distributed except under the following conditions: (i) with the Writer's written consent; or (ii) when printed without music in limited numbers for charitable, religious or governmental purposes, or for similar public purposes, if no profit is derived, directly or indirectly; or (iii) when authorized for printing in a book, magazine or periodical, where such use is incidental to a novel or story (as distinguished from use in a book of lyrics or a lyric magazine or folio), provided that any such use shall bear the Writer's name and the proper copyright notice; or (iv) when distributed solely for the purpose of exploiting the composition, provided, that such exploitation is restricted to the distribution of limited numbers of such copies for the purpose of influencing the sale of the composition, that the distribution is independent of the sale of any other musical compositions, services, goods, wares or merchandise, and that no profit is made, directly or indirectly, in connection therewith.

Mechanicals, Electrical Transcription, Synchronization, All Other Rights

(g) ..... % (in no case, however, less than 50%) of:

All gross receipts of the Publisher in respect of any licenses (including statutory royalties) authorizing the manufacture of parts of instruments serving to mechanically reproduce the composition, or to use the composition in synchronization with sound motion pictures, or to reproduce it upon electrical transcription for broadcasting purposes; and of any and all gross receipts of the Publisher from any other source or right now known or which may hereafter come into existence, except as provided in subdivision (i) of this paragraph 4.

Licensing Agent's Charges

(h) If the Publisher administers licenses authorizing the manufacture of parts of instruments serving to mechanically reproduce said composition, or the use of said composition in synchronization or in timed relation with sound motion pictures or its reproduction upon electrical transcriptions, or any of them, through an agent, trustee or other administrator acting for a substantial part of the industry and not under the exclusive control of the Publisher (hereinafter sometimes referred to as licensing agent), the Publisher, in determining

his receipts, shall be entitled to deduct from gross license fees paid by the Licensees, a sum equal to the charges paid by the Publisher to said licensing agent, provided, however, that in respect to synchronization or timed relation with sound motion pictures, said deduction shall in no event exceed $150.00 or 10% of said gross license fee, whichever is less; in connection with the manufacture of parts of instruments serving to mechanically reproduce said composition, said deductions shall not exceed 2½% of said gross license fee; and in connection with electrical transcriptions, said deductions shall not exceed 10% of said gross license fee.

Small Performing Royalties

(i) Nothing contained in this agreement shall alter, vary or modify the rights of Writer and Publisher to share in, receive and retain the proceeds distributed to them by the small performing rights licensing organization (i.e., ...
of which both Writer and Publisher are members or affiliated pursuant to their respective agreements with such small performing rights licensing organization.

Block Licenses

(j) The Publisher agrees that the use of the composition will not be included in any bulk or block license heretofore or hereafter granted, and that it will not grant any bulk or block license to include the same, without the written consent of American Guild of Authors and Composers on behalf of the Writer in each instance, except (i) that the Publisher may grant such licenses with respect to electrical transcription for broadcasting purposes, but in such event, the Publisher shall pay to the Writer that proportion of 50% of the gross amount received by it under each such license as the number of uses of the composition under each such license during each such license period bears to the total number of uses of the Publisher's copyrighted musical compositions under each such license during each such license period; in computing the number of the Publisher's copyrighted musical compositions for this purpose, there shall be excluded musical compositions in the public domain and arrangements thereof and those with respect to which the Publisher does not currently publish and offer for sale regular piano copies; and with respect to such licenses, the Publisher shall account to the Writer annually; (ii) that the Publisher may appoint agents or representatives in countries outside of the United States and Canada to use and to grant licenses for the use of the composition on the customary royalty fee basis under which the Publisher shall receive not less than 10% of the marked retail selling price in respect of regular piano copies, and 50% of all other revenue; if, in connection with any such bulk or block license, the Publisher shall have received any advance, the Writer shall not be entitled to share therein, but no part of said advance shall be deducted in computing the composition's earnings under said bulk or block license. A bulk or block license shall be deemed to mean any license or agreement, domestic or foreign, whereby rights are granted in respect of two or more musical compositions.

Television and New Uses

(k) Except to the extent that the Publisher and Writer have heretofore or may hereafter assign to or vest in the small performing rights licensing organization of which Writer is a member or an affiliate, the said rights or the right to grant licenses therefor, it is agreed that no licenses shall be granted without the written consent, in each instance, of the Writer for the use of the composition by means of television, or by any means, or for any purposes not commercially established, or for which licenses were not granted by the Publisher on musical compositions prior to June 1, 1937.

Writer's Consent to Licenses

(l) The Publisher shall not, without the written consent of the Writer in each case, give or grant any right or license (i) to use the title of the composition, or (ii) for the exclusive use of the composition in any form or for any purpose, or for any period of time, or for any territory, other than its customary arrangements with foreign publishers, or (iii) to give a dramatic representation of the composition or to dramatize the plot or story thereof, or (iv) for a vocal rendition of the composition in synchronization with sound motion pictures, or (v) for any synchronization use thereof after the expiration of ten years from the date on which regular piano copies of the composition shall have been first published, or (vi) for the use of the composition or a quotation or excerpt therefrom in any article, book, periodical, advertisement or other similar publication. If, however, the Publisher shall give to the Writer written notice, by registered mail or telegram, specifying the right or license to be given or granted, the name of the licensee and the terms and conditions thereof, including the price or other compensation to be received therefor, then, unless the Writer (or any one or more of them) shall, within seventy-two hours (exclusive of Saturdays, Sundays and holidays) after the delivery of such notice to the address of the Writer hereinafter designated, object thereto, the Publisher may grant such right or license in accordance with the said notice without first obtaining the consent of the Writer. Such notice shall be deemed sufficient if sent to the Writer at the address or addresses hereinafter designated or at the address or addresses last furnished to the Publisher in writing by the Writer.

Trust for Writer

(m) Any portion of the receipts which may become due to the Writer from license fees (in excess of offsets), whether received directly from the licensee or from any licensing agent of the Publisher, shall, if not paid immediately on the receipt thereof by the Publisher, belong to the Writer and shall be held in trust for the Writer until payment is made; the ownership of said trust fund by the Writer shall not be questioned whether the monies are physically segregated or not.

Writer Participation

(n) The Publisher agrees that it will not issue any license as a result of which it will receive any financial benefit in which the Writer does not participate.

Writer Credit

(o) Every license or authorization issued by the Publisher authorizing the publication of the composition or any part thereof shall contain a provision requiring the user thereof to print, in addition to the copyright notice, the name of the Writer as the author thereof.

Change in Piano Copy Royalty

(p) If a fixed royalty is designated to be payable with respect to regular piano copies of the composition (as provided in paragraph 4 (b) (i), then, if at any time, the Publisher shall increase or decrease the wholesale selling price which it charged on January 1, 1947 to regular music jobbers for regular piano copies of musical compositions of the same class or category as the composition, then the said fixed royalty shall be increased or decreased in proportion to the change in said wholesale selling price.

Writers' Respective Shares

5. Whenever the term "Writer" is used herein, it shall be deemed to mean all of the persons named herein below, and any and all royalties herein provided to be paid to the Writer shall be paid jointly to the following persons if there be more than one, and shall be divided among them as follows:

Name	Share
.....	.....
.....	.....
.....	.....
.....	.....

Publication

6. (a) The Publisher shall, within one year from the date hereof, make, publish and offer for sale regular piano copies of the composition in the form and through the channels customarily employed by it for that purpose, and in addition, either (i) cause a commercial phonograph recording to be made and distributed in the customary form and through the customary commercial channels, or (ii) make, publish and offer for sale a dance orchestra arrangement. As an alternative to compliance with (i) or (ii), the Publisher shall pay to the Writer the sum of $250.00 less the aggregate of any advances paid, as stated in Paragraph 4 (a) hereof, and any royalties paid to the Writer within said one-year period. If, in the statement of "Special Exceptions" hereinafter set forth, the composition shall have been designated as one which is not intended for publication in regular piano copies, the Publisher shall be deemed to have complied with this paragraph by the making and distribution of a commercial phonograph recording and either the publication of a dance orchestra arrangement or the payment of the $250.00, all as aforesaid.

Failure to Publish

(b) Should the Publisher fail to comply with the provisions of subdivision (a) hereof, the Writer shall be entitled to demand in writing the return of the composition at any time after the expiration of said year, whereupon the Publisher must, within one month after the receipt of such notice, either comply with the provisions of subdivision (a) hereof, in which event this contract will remain in full force and effect, or upon its failure so to comply, this contract shall terminate and all rights of any and every nature in and to the composition and in and to any and all copyrights secured thereon in the United States and throughout the world, shall re-vest in and become the property of the Writer and shall be reassigned to him by the Publisher; the Writer shall not be obligated to return or pay to the Publisher any advance or indebtedness as a condition of such re-assignment; the said re-assignment shall be in accordance with and subject to the provisions of Paragraph 13 hereof, and in addition, the Publisher shall pay to the Writer all gross sums which it has theretofore or may thereafter receive in respect of the composition.

Writer's Copies

(c) The Publisher shall furnish the Writer copies of the composition which it publishes and shall use its best efforts to furnish or cause to be furnished to the Writer copies published by others.

Foreign Copyright

7. (a) Each copyright on the composition in countries other than the United States shall be secured only in the name of the Publisher, and the Publisher shall not at any time divest itself of said foreign copyright directly or indirectly, except to the extent that it may be obligated to do so by virtue of an agreement entered into by the Publisher with a foreign publisher prior to January 1, 1947, and then only for the term of said agreement.

Foreign Publication

(b) Except to the extent that the Publisher is obligated to a foreign publisher or licensee by written agreement made prior to January 1, 1947, and then only for the term of said agreement, no rights shall be granted by the Publisher in the composition to any foreign publisher or licensee inconsistent with the terms hereof, nor shall any foreign publication rights in the composition be given to a foreign publisher or licensee unless and until the Publisher shall have complied with the provisions of Paragraph 6 hereof.

Foreign Advance

(c) If foreign rights in the composition are separately conveyed, otherwise than as a part of the Publisher's current and/or future catalog, not less than 50% of any advance received in respect thereof shall be credited to the account of and paid to the Writer.

Foreign Percentage

(d) The percentage of the Writer on monies received from foreign sources shall be computed on the Publisher's net receipts, provided, however, that no deductions shall be made for offsets of monies due from the Publisher to said foreign sources; or for advances made by such foreign sources to the Publisher, unless the Writer shall have received at least 50% of said advances.

No Foreign Allocations

(e) In computing the receipts of the Publisher from licenses granted in respect of synchronization with sound motion pictures, or in respect of any world-wide licenses, or in respect of licenses granted by the Publisher for use of the composition in countries other than the United States, no amount shall be deducted for payments or allocations to publishers or licensees in such countries.

Terms of Contract

8. All rights in and to the composition and any copyrights secured thereon throughout the world, shall revert to the Writer upon expiration of the original term of the United States copyright or at the end of twenty-eight (28) years from the date of publication in the United States, whichever period shall be shorter. The Publisher shall, at the expiration of said period, execute any and all documents which may be necessary or proper to re-vest in the Writer any and all rights in and to the composition and in and to any copyright in the United States or any other countries throughout the world; provided, however, that if the Writer shall sell or assign to some person other than the Publisher, his rights in the United States renewal copyright in the composition, or any of his rights in the composition in the United States or elsewhere, for the period beyond said original term or twenty-eight years, as the case may be, then, unless there shall have been given to the Publisher at least six months' written notice of an intention to offer said rights for sale, the Publisher shall not be obligated to assign to the Writer said rights in countries other than the United States and Canada, and this contract, and the assignment under Paragraph 1 hereof, shall all continue in respect of such rights in countries other than the United States and Canada.

Negotiations for New or Unspecified Uses

9. If the Publisher desires to exercise a right in and to the composition now known or which may hereafter become known, but for which no specific provision has been made herein, the Publisher shall give written notice to the Writer thereof. Negotiations respecting all the terms and conditions of any such disposition shall thereupon be entered into between the Publisher (and/or the National Music Publishers' Association, Inc.) and the American Guild of Authors & Composers; and no such right shall be exercised until specific agreement has been made.

Royalty Statements and Payments

10. The Publisher shall render to the Writer, hereafter, royalty statements accompanied by remittance of the amount due on or before, each May 15th covering the 3 months ending March 31st; each August 15th covering the 3 months ending June 30th; each November 15th covering the 3 months ending September 30th; each February 15th covering the 3 months ending December 31st; provided, however, that if it shall have heretofore been the custom of the Publisher to render royalty statements accompanied by remittance of the amount due semi-annually, or quarterly at the end of different quarterly periods, such custom may be continued. The Writer may at any time, or from time to time, make written request for a detailed royalty statement, and the Publisher shall, within sixty days, comply therewith. Such royalty statements shall set forth in detail the various items, foreign and domestic, for which royalties are payable thereunder and the amounts thereof, including, but not limited to, the number of copies sold and the number of uses made in each royalty category. If a use is made in a publication of the character provided in Paragraph 4, subdivision (e) hereof, there shall be included in said royalty statement the title of said publication, the publisher or issuer thereof, the date of and number of uses, the gross license fee received in connection with each publication, the share thereto of all the writers under contract with the Publisher, and the Writer's share thereof. There shall likewise be included in said statement a description of every other use of the composition, and if by a licensee or licensees their name or names, and if said use is upon a part of an instrument serving to reproduce the composition mechanically, the type of mechanical reproduction, the title of the label thereon, the name or names of the artists performing the same, together with the gross license fees received, and the Writer's share thereof.

Examination of Books

11. (a) The Publisher shall from time to time, upon written demand of the Writer or his representative, permit the Writer or his representative to inspect at the place of business of the Publisher, all books, records and documents relating to the composition and all licenses granted, uses had and payments made therefor, such right of inspection to include, but not by way of limitation, the right to examine all original accountings and records relating to uses and payments by manufacturers of commercial phonograph records and music rolls; and the Writer or his representative may appoint a certified public accountant who shall at any time during usual business hours have access to all records of the Publisher relating to the composition for the purpose of verifying royalty statements rendered or which are delinquent under the terms hereof.

(b) The Publisher shall upon written demand of the Writer or his representative, cause any licensing agent in the United States and Canada to furnish to the Writer or his representative, statements showing in detail all licenses granted, uses had and payments made in connection with the composition, which licenses or permits were granted, or payments were received, by or through said licensing agent, and to permit the Writer or his representative to inspect at the place of business of such licensing agent, all books, records and documents of such licensing agent, relating thereto. Any and all agreements made by the Publisher with any such licensing agent shall provide that any such licensing agent will comply with the terms and provisions hereof. In the event that the Publisher shall instruct such licensing agent to furnish to the Writer or his representative statements as provided for herein, and to permit the inspection of the books, records and documents as herein provided, then if such licensing agent should refuse to comply with the said instructions, or any of them, the Publisher agrees to institute and prosecute diligently and in good faith such action or proceedings as may be necessary to compel compliance with the said instructions.

(c) With respect to foreign licensing agents, the Publisher shall make available the books or records of said licensing agents in countries outside of the United States and Canada to the extent such books or records are available to the Publisher, except that the Publisher may in lieu thereof make available any accountants' reports and audits which the Publisher is able to obtain.

Default in Payment or Prevention of Examination

12. If the Publisher shall fail or refuse, within sixty days after written demand, to furnish or cause to be furnished, such statements, books, records or documents, or to permit inspection thereof, as provided for in Paragraphs 10 and 11 hereof, or within thirty days after written demand, to make the payment of any royalties due under this contract, then the Writer shall have the option, to be exercised upon ten days' written notice, to terminate this contract. However, if the Publisher shall:

(a) Within the said ten-day period:

(i) serve upon the Writer a written notice demanding arbitration; and

(ii) if the demand be for statements, books, records or documents, or to permit inspection thereof, deposit with National Music Publishers' Association, Inc. a re-assignment to the Writer of the copyright and all other rights in and to the composition, to be held in escrow pending the determination of the arbitration, or if the demand be for royalties, then deposit in escrow with National Music Publishers' Association, Inc., the amount shown by its books to be due the Writer under the provisions of this contract; and,

(b) Submit to arbitration its claim that it has complied with its obligation to furnish statements, books, records or documents, or permitted inspection thereof, or to pay royalties, as the case may be, or both, and thereafter comply with any award of the arbitrators within ten days after such award or within such time as the arbitrators may specify;

then this contract shall continue in full force and effect as if the Writer's option had not been exercised. But if the Publisher shall fail to comply with the foregoing provisions, then this contract shall be deemed to have been terminated as of the date of the Writer's exercise of his option to terminate this contract.

Termination of Contract

13. Upon the termination of this contract, all rights of any and every nature in and to the composition and in and to any and all copyrights secured thereon in the United States and throughout the world, shall re-vest in and become the property of the Writer, and shall be re-assigned to the Writer by the Publisher free of any and all encumbrances of any nature whatsoever, provided that:

(a) The said re-assignment by the Publisher may, however, be subject to such rights, if any, as may have been vested in a foreign publisher respecting the use of the composition in countries other than the United States and Canada under any agreement made prior to January 1, 1947.

(b) If the Publisher, prior to such termination, shall have granted a domestic license for the use of the composition, not inconsistent with the terms and provisions of this contract, the re-assignment may be subject to the terms of such license.

(c) In either of the events mentioned in subdivisions (a) and (b) of this paragraph, however, the Publisher shall assign to the Writer all rights which it may have under any such agreement or license in respect of the composition, including, but not limited to, the right to receive all royalties or other monies earned by the composition thereunder after the date of termination of this contract. Should the Publisher or any affiliate receive or be credited with any royalties or other monies so earned, it shall pay the same to the Writer.

(d) The Writer shall not be obligated to return or pay to the Publisher any advance or indebtedness as a condition of the re-assignment provided for in this Paragraph 13, and shall be entitled to receive the plates and copies of the composition in the possession of the Publisher.

(e) The termination of this contract shall not relieve the Publisher of his obligation to pay any and all royalties which may have accrued to the Writer prior to such termination.

(f) The Publisher shall execute any and all documents and do any and all acts or things necessary to effect any and all re-assignments to the Writer herein provided for.

Notices

14. All written demands and notices provided for herein shall be sent by registered mail.

Suits for Infringement

15. Any legal action brought by the Publisher against any alleged infringer of the composition shall be initiated and prosecuted at its sole cost and expense, but if the Publisher should fail, within thirty days after written demand, to institute such action, the Writer shall be entitled to institute such suit at his cost and expense. All sums recovered as a result of any such action shall, after the deduction of the reasonable expense thereof, be divided equally between the Publisher and the Writer. No settlement of any such action may be made by either party without first notifying the other; in the event that either party should object to such settlement, then such settlement shall not be made if the party objecting assumes the prosecution of the action and all expenses thereof, except that any sums thereafter recovered shall be divided equally between the Publisher and the Writer after the deduction of the reasonable expenses thereof.

Infringement Claims

16. (a) If a claim is presented against the Publisher alleging that the composition is an infringement upon some other work or a violation of any other right of another, and because thereof the Publisher is jeopardized, it shall forthwith serve a written notice upon the Writer setting forth the full details of such claim. The pendency of said claim shall not relieve the Publisher of the obligation to make payment of the royalties to the Writer hereunder, unless the Publisher shall deposit said royalties as and when they would otherwise be payable, in an account in a bank or trust company in the City of New York in the joint names of the Publisher and the Writer. If no suit be filed within nine months after said written notice from the Publisher to the Writer, all monies deposited in said joint account shall be paid over to the Writer plus any interest which may have been earned thereon.

(b) Should an action be instituted against the Publisher claiming that the composition is an infringement upon some other work or a violation of any other right of another, the Publisher shall forthwith serve written notice upon the Writer containing the full details of such claim. Notwithstanding the commencement of such action, the Publisher shall continue to pay the royalties hereunder to the Writer unless it shall, from and after the date of the service of the summons, deposit said royalties as and when they would otherwise be payable, in an account in a bank or trust company in the City of

New York in the joint names of the Publisher and the Writer. If the said suit shall be finally adjudicated in favor of the Publisher or shall be settled, there shall be released and paid to the Writer all of such sums held in escrow less any amount paid out of the Writer's share with the Writer's written consent in settlement of said action. Should the said suit finally result adversely to the Publisher, the said amount on deposit shall be released to the Publisher to the extent of any expense or damage it incurs and the balance shall be paid over to the Writer.

(c) In any of the foregoing events, however, the Writer shall be entitled to payment of said royalties or the money so deposited at and after such time as he files with the Publisher a surety company bond, or a bond in other form acceptable to the Publisher, in the sum of such payments to secure the return thereof to the extent that the Publisher may be entitled to such return. The foregoing payments or deposits or the filing of a bond shall be without prejudice to the rights of the Publisher or Writer in the premises.

Arbitration

17. Any and all differences, disputes or controversies arising out of this contract shall be submitted to arbitration under the laws of the State of New York, and the parties hereby individually and jointly agree to abide by and perform any award rendered in such arbitration, and agree that a judgment of the Supreme Court of the State of New York may be entered upon such award. Together with the demand for arbitration, the party making said demand shall designate an arbitrator and the adverse party shall, within ten days thereafter, likewise designate an arbitrator. The two arbitrators so chosen shall promptly appoint a third arbitrator who shall act as Chairman and any award concurred in by a majority of the arbitrators shall be binding upon the parties. Should the party against whom arbitration is demanded fail to select an arbitrator, or should the arbitrators selected by the parties be unable to agree upon a third arbitrator, then said arbitrator or arbitrators, as the case may be, shall be designated and appointed in the manner provided by the Arbitration Law of the State of New York.

Assignment

18. Except to the extent herein otherwise expressly provided, the Publisher shall not sell, transfer, assign, convey, encumber or otherwise dispose of the composition or the copyright or copyrights secured thereon without the prior written consent of the Writer. The Writer has been induced to enter into this contract in reliance upon the value to him of the personal service and ability of the Publisher in the exploitation of the composition, and by reason thereof it is the intention of the parties and the essence of the relationship between them that the rights herein granted to the Publisher shall remain with the Publisher and that the same shall not pass to any other person, including, without limitations, successors to or receivers or trustees of the property of the Publisher, either by act or deed of the Publisher or by operation of law, and in the event of the voluntary or involuntary bankruptcy of the Publisher, this contract shall terminate, provided, however, that the composition may be included by the Publisher in a bona fide voluntary sale of its music business or its entire catalog of musical compositions, or in a merger or consolidation of the Publisher with another corporation; and provided further that the composition and the copyright therein may be assigned by the Publisher to a subsidiary or affiliated company generally engaged in the music publishing business. If the Publisher is an individual, the composition may pass to a legatee or distributee as part of the inheritance of the Publisher's music business and entire catalog of musical compositions. Any such transfer or assignment shall, however, be conditioned upon the execution and delivery by the transferee or assignee to the Writer of an agreement to be bound by and to perform all of the terms and conditions of this contract to be performed on the part of the Publisher.

Subsidiary Defined

19. A subsidiary, affiliate, or any person, firm or corporation controlled by the Publisher or by such subsidiary or affiliate, as used in this contract, shall be deemed to include any person, firm or corporation, under common control with, or the majority of whose stock or capital contribution is owned or controlled by the Publisher or by any of its officers, directors, partners or associates, or whose policies and actions are subject to domination or control by the Publisher or any of its officers, directors, partners or associates.

Minimums

20. The minimum amounts and percentages specified in this contract shall be deemed to be the amounts and percentages agreed upon by the parties hereto, unless greater amounts or percentages are inserted in the blank spaces provided therefor.

Countersignature and Modifications

21. This contract is binding upon and shall enure to the benefit of the parties hereto and their respective successors in interest (as hereinbefore limited), but shall be effective only when countersigned by the American Guild of Authors & Composers. If the Writer (or one or more of them) shall not be living, any notices may be given to, or consents given by, his or their successors in interest. No change or modification of this contract shall be effective unless reduced to writing, signed by the parties hereto, and countersigned by the American Guild of Authors & Composers.

Marginal Notes

22. The marginal notes are inserted only as a matter of convenience and for reference, and in no way define, limit or describe the scope or intent of this contract nor in any way affect this contract.

Exceptions to Warranties

23. The rights specifically excepted, as provided in Paragraph 3 hereof are as follows:

Witness: Publisher .....

..... By .....

Witness: Address .....

..... Writer ..... (L.S.)

Witness: Address .....

..... Writer ..... (L.S.)

Witness: Address .....

..... Writer ..... (L.S.)

AMERICAN GUILD OF AUTHORS & COMPOSERS
formerly
Countersigned: SONGWRITERS PROTECTIVE ASSOCIATION Address .....

By: .....

* * * * *

Special Exceptions to apply only if filled in and initialed by the parties.

☐ (a) The composition is:

☐ Standard ☐ Pastoral
☐ Secular ☐ Instrumental

and the Publisher is not required to publish piano copies or otherwise comply with the provisions of Paragraph 6.

☐ (b) The composition is one of a number of musical compositions delivered to the Publisher by the Writer under an agreement dated , a copy of which is hereto annexed. Unless a shorter period is stated in the annexed agreement, the Writer shall not be entitled to demand the return of the composition for the Publisher's failure to publish regular piano copies or otherwise with the provisions of Paragraph 6, until five years after the expiration of the said annexed agreement.

☐ (c) The composition is part of an original score (not an interpolation) of

☐ Living Stage Production ☐ Motion Picture ☐ Night Club Revue

which is the subject of an agreement between the parties dated , a copy of which is hereto annexed. Unless said agreement requires compliance with Paragraph 6 in respect of a greater number of musical compositions, the Publisher shall be deemed to have complied with said Paragraph 6 with respect to the composition if it fully performs the terms of said Paragraph 6 in respect of any one musical composition included in said score.

☐ (d) The composition is not one intended to be published in regular piano copies.

CBS v. ASCAP

Plaintiffs' Exhibit No. 84

Letter dated 10/29/59 from Salvatore Chiantia to Miriam Stern.

E 440

Telephone Circle 5-1100
Cable Address: Leedsmusic
322 West 48th Street, New York 36, N. Y.

October 29, 1959

/73
Ex
4 id
L.H.

Miss Miriam Stern
AGAC
158 West 55th Street
New York 19, N.Y.

Dear Miriam:

This is in confirmation of our telephone conversation last week.

As I told you, we have secured from the writers of various compositions covered by the "1947 SPA Contract" approvals allowing us to issue during five years synchronization licenses for TV films at not less than $25. per film. Most of the writers originally gave us their approval by letter. At our request, they subsequently confirmed their approval by signing the SPA "Synchronization Schedule" form as they are in full sympathy with our efforts to increase the performances of their compositions by getting them into the TV films which are now being produced.

In this connection may I repeat that, if we are not able to give licenses to TV film producers at $25. per film, or if we have to obtain the written consent of each writer for each individual use, we would for all practical purposes never get the compositions from our catalogs into current TV films other than in a few rare instances. The writers who have given us their approval are aware of the competitive situation which exists in connection with the use of music in the filmed TV programs produced in Hollywood. It is because of that very reason that they gave us their okay to go ahead.

We are ready to submit the synchronization schedules which we have received to AGAC for counter-signature, and I look forward to hearing from you in this regard.

With best personal regards,

Sincerely yours,

LEEDS MUSIC CORPORATION

Salvatore T. Chiantia

AAG:gb

E 441

CBS v. ASCAP

Plaintiffs' Exhibit No. 102

Post-1970 pamphlet, "ASCAP--The Facts".

E 442

ASCAP

the facts

AND

what it is
why it is
who belongs
how it works

AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS
One Lincoln Plaza, New York, N.Y., 10023

CBS- Antonus Exh. 102 W.
4/3/72 MD

(1) WHAT IS ASCAP?

The American Society of Composers, Authors and Publishers (ASCAP) is not a union or a musicians' group, but a clearing house for performing rights in music. It licenses the right TO PERFORM ... IN PUBLIC ... FOR PROFIT in the United States the copyrighted musical works of its members and the members of affiliated societies in more than thirty countries. It is an unincorporated non-profit society of writers and publishers; it has no treasury and regularly distributes all revenues above operating expenses to its members.

(2) WHO ARE THE MEMBERS?

The members are some 12,000 American composers and lyricists ("authors") and their 4,000 publishers. Their collective repertories, both "popular" and "serious," represent the great compositions that have made our country's music an important factor in world culture and entertainment.

(3) IS ASCAP ONLY FOR ESTABLISHED WRITERS OR PUBLISHERS?

No, new members are joining every month and they are warmly welcomed. ASCAP's royalty distribution system gets income to new members faster than ever. ASCAP's dynamic vigor and growth is highlighted by the fact that membership more than tripled between 1954 and 1971.

(4) HOW DOES ONE JOIN ASCAP?

Any composer or lyricist of a copyrighted musical work may join if he or she has had at least one musical work "regularly published." A sales copy of the published sheet music or a commercial recording of the work must be submitted with a signed application form, available from ASCAP at One Lincoln Plaza in New York City.

Associate membership is open to any writer who has had one work copyrighted. A Copyright Office certificate of registration should accompany the signed application form.

There is a great diversity of members, including writers for the Broadway and off-Broadway musical theatre, motion pictures, and television; writers of pop songs, jazz, rock, folk, soul and country music; composers of opera, symphonic, and religious works.

Publisher membership is open to any person or firm actively engaged in the music publishing business and assuming the normal financial risk involved in publishing. The Society's rules prohibit its members from using the ASCAP seal, or referring to their membership in the Society in connection with the solicitation of funds from writers for the purpose of revising, adapting, publishing or exploiting their works.

(5) WHAT DOES IT COST TO JOIN?

There is no initiation fee, and the annual dues are $10 for writers and $50 for publishers. Dues monies are used for the relief of indigent members or their dependents.

(6) WHO RUNS ASCAP?

The members, who express their views at four meetings per year and elect the Board of Directors. Policies are set by the Board of Directors which consists of twenty-four members, twelve writers and twelve publishers. The writer members of the Society elect the writer members of the Board, and the publishers elect the publisher representatives of the Board. The president is traditionally a writer member of the Board. Three of the dozen writer members on the Board and three of the publishers on the Board must be primarily concerned with "classical" music. The Board meets monthly, and votes on officers of the Society at an annual election.

(7) WHERE IS ASCAP LOCATED?

ASCAP is truly a national organization, with its headquarters in New York City and some twenty-two branch offices spread across the entire country.

(8) WHO TAKES OUT ASCAP LICENSES?

Those who use members' copyrighted music for profit in public performance are required by U.S. copyright law to secure permission to do so, and today there are some 35,000 such licensed users of ASCAP music. These include radio and television stations and networks, night clubs and hotels, wired music systems such as MUZAK, symphony orchestras, colleges and universities that sponsor concerts. Of all commercial users, only the huge half billion dollar a year jukebox industry claims an exemption from payment. This claim derives from a provision in the 1909 federal copyright law, a clause which may be repealed in the near future if the revised U.S. copyright statute now before Congress is passed.

(9) DOES ASCAP LICENSE SALES OF SHEET MUSIC OR RECORDS?

No, the Society's sole source of income is licensing the performing rights. These are limited to non-dramatic performances. Producers pay fees for the rights to stage a dramatic performance of an "Annie Get Your Gun," "South Pacific," "My Fair Lady" or "Hello, Dolly" directly to the writers.

(10) WHEN, WHERE AND WHY WAS ASCAP FOUNDED?

The Society was founded in 1914 by a group that included such outstanding composers as Victor Herbert and John Philip Sousa to insure compliance with the 1909 copyright law, which recognized that creators had certain important, exclusive and valuable rights in the works that they had created and copyrighted. The purpose of the law was to

encourage the creation of new works by payment to the writer whenever his or her works were used commercially. At the time the Society was founded, users -- the owners of the country's increasingly popular dance halls, hotel ballrooms, night clubs, etc. -- were making handsome profits from customers drawn to enjoy public performances of copyrighted musical works. But in direct violation of the 1909 statute, the users ignored the license requirement and paid nothing for the right to perform.

Although ASCAP was founded to insure compliance with the statute, it has developed into an immensely useful service organization, a great convenience to both members and users. It would obviously be difficult, tedious, and costly for each writer or publisher to negotiate a separate licensing agreement for performing rights to each song with each of the many thousands of users. Similarly, it would be expensive and complicated for the users to find and negotiate licenses with each writer and publisher. Thus, the Society aids both its members and the users of music by serving as a single source of licensing and collection.

(11) WHO SETS THE ASCAP LICENSE FEES?

ASCAP negotiates these with the users, and the fees are based on such objective factors as the user's income. Any user or would-be user who is dissatisfied with the fee quoted may appeal to a federal judge in New York for redress. In a single negotiation, a license holder gets access to unlimited performances of the collective repertory of all the members.

(12) WHAT ARE THE FEES?

They vary widely, but in a non-discriminatory manner keyed to the nature of the use and the value to the user and the user's receipts from advertising. For example, a local radio station will pay a much lower fee than a television network. Two similar users with comparable economic and music factors will pay approximately the same for ASCAP licenses. Users who choose a blanket license do not account separately and pay for each performance. They pay only a single license fee to ASCAP for their use of any of the members' musical works. The Society undertakes the problem of accounting and distributes the total license fee income among members.

(13) HOW IS THE ASCAP LICENSE INCOME DISTRIBUTED TO MEMBERS?

As mentioned, ASCAP's sole receipts are from the license fees. After the Society's operating costs (16% of income in 1970) are paid, half of the remainder goes to the writers and the other half to the publishers. Each of the two groups has its own formula for apportioning its income, and any member who is dissatisfied may protest to an internal Board of Review elected to hear such complaints. Appeals from this Board may be taken to an independent panel, under the rules of the American Arbitration Association. ASCAP, a democratic voluntary association, is committed to fairness and the well-being of its members.

The key factor in the distribution of income to the members is the number of performances of a work noted and logged in ASCAP's large and carefully operated Survey of Performances of radio (AM and FM), television, wired music and similar devices. The Survey is designed by an independent consulting firm, and is reviewed from time to time by appointees of the Federal Court. This is a further effort to insure that the Survey system is statistically sound, adequately comprehensive and assures fair treatment. In weighting performances, a feature performance is rated more "important" in terms of credits than a background performance, for example, and performance of serious works such as symphonies, chamber works and the like are given a multiple of credits instead of one. This has been voted by the members in a deliberate effort to encourage American composers of the "classical" repertory.

A large part of the skilled ASCAP staff is employed in the Survey. Hundreds of thousands of man-hours and extensive use of modern computers go into the Survey and weighting of performances and quarterly distribution of royalties.

(14) ARE ASCAP MEMBERS PAID FOR PERFORMANCES ABROAD?

Yes, because ASCAP has carefully developed relationships with more than thirty foreign performing rights societies that are now ASCAP affiliates. ASCAP members are represented abroad by these foreign societies which license performing rights in their respective countries. In this country, the ASCAP license and Survey of Performances include the works in these foreign societies' repertories, and ASCAP sends these societies a share of the collective license fees reckoned on the number and type of performances.

(15) MUST A WRITER OR PUBLISHER JOIN ASCAP?

No. ASCAP is a voluntary association and one joins only if one wants to have one's performing rights licensed by and protected by the largest, most respected and most successful cooperative "clearing house" for music rights in the world and the only one in the United States operated by and for the composers, authors and publishers themselves.

(16) MUST A MUSIC USER DEAL WITH ASCAP?

No. If the musical work is not performed in public for profit or is not part of the ASCAP repertory, the user obviously does not need an ASCAP license. If the performance is public and for profit he may obtain a license either from the copyright owner directly or from ASCAP if it is in the ASCAP repertory. Music users who perform a lot of music are almost certain to want to play many ASCAP works, since the vast majority of gifted American writers license their performing rights through ASCAP. These compositions are ASCAP-licensed, not ASCAP-owned. The Society owns no copyrights, for these remain with the members. The members merely grant ASCAP a non-exclusive right to license non-

dramatic performances as long as the member remains in the Society.

(17) WHAT HAPPENS WHEN A MEMBER DIES?

His or her estate is eligible to receive royalties from ASCAP based on performances of the musical works until the copyrights on those works expire. Some of the estates drawing income from ASCAP are those of George Gershwin, Cole Porter, Bela Bartok, W.C. Handy, Jerome Kern, Oscar Hammerstein, Victor Herbert, Serge Rachmaninoff, Deems Taylor and Sigmund Romberg. The estate of a deceased writer or publisher, who was not a member, may also apply for membership.

(18) CAN ONE SECURE A LIST OF ASCAP MEMBERS?

A simple list of names — in alphabetical order — is available, and the Third Edition of the ASCAP Biographical Dictionary is also available. This 845 page hard-cover book contains biographical sketches of writer members and a list of all publisher members; the price is $5.25

(19) CAN ONE SECURE A LIST OF ALL THE WORKS IN THE ASCAP REPERTORY?

The complete list is maintained in the Society's Index Department at the New York City headquarters. A fairly comprehensive three volume, ASCAP INDEX of popular songs performed in the Society's survey may be purchased for $15. Also available is the Second Edition of the ASCAP SYMPHONIC CATALOG.

(20) WHERE MAY ONE SECURE MORE INFORMATION ABOUT ASCAP?

You may check your local telephone directory to find out whether any of the Society's twenty-two branch offices is located in your city, or you may get in touch with either the Public Information Department or the Membership Department of

ASCAP
One Lincoln Plaza
New York, New York 10023

Further information on ASCAP membership is available from

NEW YORK:
David Combs, ASCAP
One Lincoln Plaza
New York, New York 10023
212-595-3050

LOS ANGELES:
Herbert N. Gottlieb, ASCAP
6430 Sunset Boulevard
Hollywood, California 90028
213-466-7681

NASHVILLE:
Ed Shea, ASCAP
700-17th Avenue South
Nashville, Tennessee
615-244-3936.

CBS v. ASCAP

Plaintiffs' Exhibit No. 106

Stanley Adams' "Remarks-AGAC Meeting, Hotel Edison, October 28".

E 449

STANLEY ADAMS

REMARKS - ACAC MEETING
HOTEL EDISON, OCTOBER 2[illegible]

In less than a century the inventive genius of our country has accelerated a coast to coast journey from the covered wagon of three months to the jet plane trip of five hours.

In more than half the century, namely since the Copyright Act of 1909, the acceleration of the interests of the creators of our country lags behind the pace of the slowest snail alive.

In the scientific field--enormous progress.

In the cultural field--appalling inertia.

So, left to our own devices we have attempted to get together to protect and foster the inherent rights that we all possess. These devices have taken the form of organizations--all bearing different labels to define

CBS-Adams Ex. 106 (A)
4/4/73 (A)

a particular segment of creative endeavor. But, whatever the label, they all have a single purpose.

To resist the splitting of our ranks so that we can be picked off one by one.

To not only take the creators out of the cold water flat but to take the cold water flat out of the creator.

To improve the position of the writer so that he is on a par with the user.

Above all to stand firm against all attempts to be paid as a matter of sufferance rather than as a matter of right.

One of the outstanding organizations of this type is AGAC. Only last week I had dinner with an outstanding writer who told us what he regarded as

amusing stories of his early days. How writers competed one against the other to sell songs outright until finally the price was as low as $5. As additional consideration this writer had to agree to plug his song and pay his own carfare. Further more, he had to argue with the manager of a theater or the owner of a saloon to bellow in his booming baritone jargon to the assembled gentry who as often as not told him to shut up and get out.

Maybe I have lost my sense of humor, but I was not amused.

Of course, about that time some publishers began to issue royalty contracts. They were like royalty throwing a crumb to a passing beggar.

E 452

Finally in 1931 AGAC, then called SPA encouraged and supported by writers who, although they could have walked alone, had a fellowship of equity and a kinship with justice and to whom we shall ever be grateful, reached agreement with the publishers on the first minimum basic contract.

Sense

Over the years, each succeeding contract has worked out improvement until today a writer lives in comparative Utopia when contrasted to his position only two generations ago.

But here a word of caution seems indicated. The eventual aim and goal is a document that will work the greatest good for the entire craft. [illegible] must take the attitude that if his particular theories are not

adopted he won't play on the team any more.

Such a view point will bring confusion.

Such an assertion will bring chaos.

Such an insistence will destroy us.

We need each other more now than ever before.

The rugged individual is today a museum piece. With electronic development resulting in instantaneous tape recording, with a viewing and listening audience of 80 million people, with over 33 hundred radio stations and some 300 TV stations, with the networks close to international telecasting, with the real possibility of pay TV, with over 14 hundred publishers and hundreds of recording companies, please don't labor under the delusion that this is a "do-it-yourself" operation.

This organization has been the sentinel and the guardian of your publication and renewal rights for the past 28 years. It withstood every assault and always emerged stronger. It will continue to do so but let's realize that we must submerge our personal feelings and support the theory of compromise, for after all, no one can be all together right or all together wrong.

There can be nothing as important as presenting a solid front across the negotiating table. If we dissipate our energies fighting among ourselves, we will have exhausted the ammunition we need in the battles ahead.

Clause by clause, contract by contract, AGAC has improved the position and security of all of us--the beginner and the veteran, the big writer and the small one, the rock 'n' roll, the ballad, the novelty, the popular and the production writer all nestled together

under one umbrella--an umbrella that will cover us just as long as we collectively hold it up and not one second longer.

So that when someone thinks he is getting an addition by making a little deal on the side that sabotages our basic contract, he is really sabotaging himself--he is making a little hole in the fabric of the umbrella. Every hole causes a leak, enough leaks and the rain pours in and I have never met any person who can walk in the rain without getting wet.

Sure it's easy for the young to be impatient with the old.

Sure it's easy for a winner to be patronizing to a loser.

It's easy for the healthy one to look at his

sick friend and say "Him, yes--but it can't happen to me."

But, it's a funny thing. It always does happen to him.

I don't know a single writer who hasn't had those well-known ups and those well-known downs.

I don't know one who can point to an unbroken string of successes for his entire career.

Yes, it can happen to anyone.

AGAC is just a name. AGAC really is you, its membership. If you want it to be strong--you must be strong--if you want it to stand firm--you must stand firm. It is a big mirror that reflects only what our collective face reflects--strength or weakness--selfishness or co-operation.

Common sense indicates working for the common good so that ~~a~~ when some legislator ~~professes~~ pronounces

"I care not who writes the laws of the country,

so long as I may listen to its songs."

We can reply in one united voice, "Make the proper laws

so that we can continue to write the nation's songs."

E 458

CBS v. ASCAP

Plaintiffs' Exhibit No. 123

Letter dated 11/4/65 re 3M from Harold Spina to Miriam Stern.

November 4, 1965 E 459

Miss Miriam Stern
American Guild of Authors & Composers
50 West 57th Street
New York, N. Y. 10019

RECEIVED
NOV 8 1965

Dear Miriam:

I have just returned from a West Coast committee meeting held at the Gourmet Beverly Hills, attended by the following:

Harold Ad[illegible]on ✓
Eddie Beal
Gene DePaul ✓
Ray Evans ✓
Sammy Fain ✓
Ray Gilbert ✓
Donald Kahn (guest)
Moe Jerome ✓
Paul Webster ✓
Jerry Livingston ✓
Jimmy McHugh ✓
Johnny Mercer ✓
Vic Mizzy ✓
Don Raye ✓
Harry Ruby ✓
Harold Spina ✓
Harry Tobias ✓
Ned Washington

After the reading of the Leon Kellman report on 3M of October 20th, which was discussed, explained and analyzed, and also reporting on my conversation with you of last night, they concluded as follows:

1. That AGAC is properly acting in behalf of its members in notifying the publishers that they are in violation of our contract re bulk licenses, etc., and that the publishers must request permission from the writers.

2. That the writers are to be advised by AGAC of the damaging results that affect the entire performing rights structure should they grant permission to the publishers.

Since no one was prepared to venture how far beyond this AGAC could or would go, there was a sense of frustration. They understand that there are many things AGAC cannot do legally in protecting the writer or <u>enforcing</u> the contract, but a suggestion was made that may be helpful.

Rather than place the writer in a position to have to answer the publisher's request and possibly get into an embarrassing or personal beef, it was felt that a solid front could be presented by AGAC as follows: A form letter be sent along to be signed by the writers, returned to AGAC, and kept on file, containing essentially the fact that they will <u>not</u> grant permission to <u>any</u> of the publishers on any of their songs involved.

It was unanimously indicated here that they would pledge themselves to this cause and enlist most of the other important writers out here to do the same, whether a member of AGAC or not. And, if the same could be done by the boys in New York, that a big dent would be felt by the publishers, who would <u>not</u> be able to deliver to 3M a large proportion of their catalogues, and, by weakening the publishers' position, cause 3M to reconsider.

CBS - Some Ltr. 12 3 65

While we would not put them out of business, (because of the pre-1937 songs plus PD's), nor can we stop some songwriters from making a deal, our weight of songs denied them might make 3M remove the performance portion of their agreements with publishers and force them to negotiate with ASCAP.

We are also aware that 3M has already recorded over 5000 songs in Europe. Now, if only half are to be discarded because of the publishers' inability to deliver, this could upset 3M's plans to deliver tapes to their customers. More reason, therefore, for 3M to squeeze the publishers to remove the performance clause and not take a tremendous loss of the recording costs already invested.

We believe the above to have merit. Will you have New York consider the proper procedures and institute action immediately.

Best,

Harold Spina
West Coast Chairman

P.S. You may be interested in knowing that Donald Kahn was approached by 3M and refused to negotiate on his catalogue, which includes the bulk of Gus Kahn's songs.

Also, Criterion Music (Mickey Goldsen) has acquired signatures and releases from the writers on his catalogue. ALL, except Johnny Mercer.

One legal question comes to mind: If on a song with two writers where one grants permission, does this bind the other writer?

H

c: Leon Kellman, Counsel
Abel Baer, Chairman

CBS v. ASCAP E 461

Plaintiff's Exhibit No. 124

Letter dated 11/19/65 from Michael H. Goldstein to Burton Lane.

RITERION USIC ...
...na Avenue, Hollywood 28, California
HOllywood 9-2296

E 462

November 19, 1965

Mr. Burton Lane
AGAC
50 West 57th Street
New York, New York 10019

RECEIVED
NOV 22 1965

Dear Mr. Lane:

I received the general letter you sent out to publishers dated November 15. I wish to state that I had contacted all the writers that were involved in the songs which I offered to 3M.

I believe that your letter contains weighted arguments against 3M which should be answered, and I believe the writers should get both sides of the story if you are going to be fair to the writers.

The 30,000 potential users of this machine are small establishments which do not pay any performing fees right now, and which in many cases are using bootleg tapes or or playing recordings in their establishments. Therefore, ASCAP is being given 30,000 potential locations which will have to face prosecution if they do not renew their license within 3 years. It is even skeptical whether the tapes will last the 3 years physically.

Since the locations will pay a performance fee on every tape they buy, and they will be buying them steadily, after 3 years it would be possible to blacklist a location which did not renew a performing license, and it would therefore be barred from purchasing tapes. There has even been a point brought up about locations going out of business and selling to other places. This is easily taken care of by the fact that when a new location wants tapes its address will then become known to the collectors.

Muzak is a specialized service which comes over wires and is programmed by times of day, occasions, etc. It is well-suited for large establishments which merely have to turn on a switch. Only a small percentage of the 3M potential market is the present Muzak cliental. For that matter, Muzak has just purchased a company which is making a machine in direct competition to 3M. So Muzak will not be adversely affected, but will have a bigger business because 3M opened a new field.

You mention that BMI has approved the deal, so it cannot be too far out of line. Without discussing the merits of the deal, three publisher members of the ASCAP board thought enough of it to enter into direct contracts with 3M. Since the members of the board are elected on their financial receipts, when ASCAP rejected the deal they did so without consulting any of the members but the board. This is why the government stated that ASCAP could not have an exclusive right on performances since it permitted the general membership a democratic right to act in its own interest if it felt that the board's decision in a matter was contrary to their thinking.

I feel that in making a deal for 3M to select songs from my catalog on a per tune basis, I have aided ASCAP since there is a favored nations clause which states that all deals must be equal. If 3M only used BMI music and this system proved successful, it might severly damage ASCAP in the background music field by proving that they could do without the big society. We have put a foot in the door and prevented anyone saying that background music does not need ASCAP tunes to exist.

You have brought up the point of having the publishers get the permission of the writers, and I believe it is a valid one. Those who entered into the agreement felt that it was in the writers' interest to enter into the deal, and I, as a publisher, have contacted the writers involved.

It is too bad you did not get more information on the merits of this deal before you wrote a prejudicial letter against it.

Yours sincerely,

Michael H. Goldsen

MHG/js

EDIV RECEIVED

AMERICAN GUILD OF AUTHORS AND COMPOS.
50 West 57th Street
New York, N. Y. 10019

E 464

3M. - Criterion Music | DATE 11/22/65 | Reply Message

MESSAGE

Here's a copy of Criterion's reply.

FOLD

SIGNED

REPLY

DATE OF REPLY | REPLY TO

SIGNED

E 465

CBS v. ASCAP

Plaintiffs' Exhibit No. 125

Memorandum dated 1/24/66 from Abel Baer to Donald Kahn enclosing AGAC Counsel "Report to the West Coast Committee" dated 1/12/65.

[illegible] MAIL
c/o Gus Kahn Music Co.
6223 Yucca Avenue
Hollywood Calif.

AMERICAN GUILD OF AUTHORS AND COMPOSERS
50 West 57th Street
New York, N. Y. 10019

E 466

RE: THE 3M PROJECT

DATE 1/24/66

Reply Message

MESSAGE

Dear Donald,

In answer to your letter of December 27th, since this subject was discussed at great length at our Council Meeting of January 14th, 1966, your letter can best be answered by sending you a copy of the portion of our Report to the Executive Committee which covers this. That copy is attached.

Kindest personal regards.

Abel Baer
Chairman of the Council

REPLY ob. of

SIGNED

DATE OF REPLY

REPLY TO

CBS - Lane Feb. 1 2 5 rd
4/6/73

SIGNED

RECIPIENT RETURNS THIS COPY TO SENDER

E 467
January 12, 1966

The Council had a long discussion of the 3M situation, with particular reference to the suggestions made by the West Coast committee (and similar suggestions made by some members in New York), that concerted action be taken by members of our organization in endeavoring to discourage publishers who have not signed with 3M, from doing so. It was pointed out by our attorney and several members of our Council, that the strong letter which we sent to publishers is as far as we can go without raising the question of whether we are conducting ourselves in a manner which might be in conflict with the law as stated in the case of Ring v. Spina, in the U.S. Circuit Court of Appeals. In that case, the Dramatists Guild was held to be a trust, and their minimum basic agreement was held to be illegal. This is not a case where someone is conducting illegal activity — 3M is engaged in a legitimate business enterprise, even though we are much concerned with some of the possible consequences of the project. As to the publishers, while we believe they are violating the AGAC contract in those cases where they grant rights to 3M without obtaining the writers' consent (and we do not know in what cases or in how many cases this has been done) they are not acting illegitimately in a sense which would legally warrant concerted action in order to combat flagrant illegality directly and seriously injurious to our members.

We are not in the situation of a labor union, which has certain rights and privileges given to them by law. For example, the members of the Writers Guild of America and CLCA can act in concert

many respects to enforce their rights or desires. The basic distinction, of course, between a labor union and an organization like ours, is that the members of a union are employees working for hire in a field of activity where the union has jurisdiction, whereas members of the Dramatists Guild, ASCAP, BMI and ourselves are independent contractors who sell or lease their property on a free-lance basis. We believe that writers suffer from injustice, and that the law should provide for proper exercise of concerted action by organizations such as ours, in certain respects. Unfortunately, it would take difficult, long-range effort by many parties and organizations, to possibly bring about such change in the law, and any such effort would be opposed by many influential interests, and in all likelihood by the Justice Department, which not long ago was even opposed to extension of the copyright term upon the ground that it would increase the factor of 'monopoly."

Individual writers, of course, are free to express their opinion to publishers, solely on a private and individual basis. Certainly if members of a numerous group in an industry take the position that they are compelled by the group to take a particular stand which could be held to be restraint of trade, then they are in danger of subjecting themselves to civil or criminal suit for restraint of trade, under the Sherman Anti-trust Act.

As a practical matter, it seems to us that if a group of writers were to take a stand against publishers who sign with 3M, and individual writers let publishers know that they themselves do not wish to take this stand (even though they may actually approve

[illegible] but that they are compelled to do so by their member-
[illegible] the group, the publishers will not be very impressed, and the
[illegible] action would be quite ineffective. Further, the world
[illegible] be given the impression that the organization is maintaining a
[illegible] of which many of its members disapprove. In view of our
[illegible], and of the widespread discussion that has taken place in the
industry with respect to the 3M project and similar projects which
[illegible] be expected to be carried out, it appears to us that if a pub-
lisher has not been persuaded by this time, to consider the matter
with the utmost care before he contemplates signing with 3M, he will
not be influenced by further expression upon the part of the writers
or their organization.

E 470

CBS v. ASCAP

Plaintiffs' Exhibit No. 127

Memorandum dated 4/22/66 from Leon Kellman to Burton Lane.

E 471

LEON KELLMAN
COUNSELOR AT LAW

575 LEXINGTON AVENUE
NEW YORK, N.Y. 10022
212-HA 1-5910

Confidential

MEMORANDUM

TO: Burton Lane

April 22, 1966

CC: Edward Eliscu
Miriam Stern

RE: Meeting Concerning 3M

This is a transcription of the notes I took at the meeting at the AGAC office yesterday at which Allen Arrow, Herman Finkelstein, you, Eddie Eliscu and I were present.

My notes are in terse form, as I had to concentrate on not-int essential points. Your recollection and Eddie's may result in adding items to this report.

On the basis of my notes and recollection, I thought I would summarize the meeting as follows: In the beginning, there seemed to be a conflict of fact or recollection between Herman and Allen with respect to the matter of money. Herman said that they would have accepted a payment of $21 or more per year per tape. Allen said it was never a matter of money but other matters.

Allen said that they have recorded a tremendous number of tunes (as they would have to do if they want to come under their present three-year licenses from publishers). They nevertheless would like to get the show tunes and other great compositions controlled by publishers who have not signed or as to which writers have not granted consent.

Allen disapproves of our letter to publishers and members. I pointed out that since we are concerned about the matter, it was our duty to inform publishers and writers of our concern.

CBS - Lane Exh. 127-W
4/6/73 HD

The notes follow:

HF: There was some discussion with 3M. 3M could not make up its mind. I had breakfast with Lindgren and told him that no matter how you do business, ASCAP is prepared to give a deal. Lindgren said he had been dealing with publishers, and they weren't ready to make a deal. In London, Bill Ricketts told me that Lindgren had offered $21 or $27. I called Lindgren and was told that this proposal is for three years, not one year.

AA: The differences were never a matter of money in the beginning. 3M wanted an averaged rate for all buyers. We presented a proposal of $27 a year for a two or three year period. These were knocked down, and we gave up because of issues other than money.

HF: We wanted to make the duration three years. We suggested an option after that for a higher price. This is a problem.

AA: ASCAP could give a two-year contract and a two-year performing license - a maximum of four years.

HF: ASCAP can now make it up to five years. We signed a contract with Musak on January 1, 1966 for five years.

AA: Deletion is the second problem, that is, deletion of tunes from ASCAP's catalogue.

HF: We can now talk up to 1975. We have signed 90% of our members for that time.

AA: The third problem is averaging. We are ready to pay $22 - $24 a year and then we can evaluate our total experience. 3M proposed this and ASCAP rejected it. There is now also the problem of existing contracts.

Burton suggested here that ASCAP should not pay publishers to the extent of money which they will receive from 3M covering the same period.

AA: 3M now has signed Mills and Frank. One suggestion is that more contracts be merged and that we pay all money to ASCAP.

HF: We cannot accept payments on a per-item basis.

AA: What about tapes in the field? We are not too concerned with guarantees or advances. On the first series, 3M has practically recouped its advances. On the second series, the guarantees are not so great. On the new series, out of 1,000 songs, about 850 are ASCAP and about 150 are BMI. There is also the problem of how we will handle tapes now in the field.

HF: We could extend the ASCAP license or they could pay the ASCAP rate.

HF: There is a problem with some wire music licensees because of 3M competition. Until you get the show tunes, you will need ASCAP. We can have Judge Ryan fix a rate. But that's money. We must find a way to do business with 3M.

AA: We are selling lately about 1500 machines a month. We may sell about 18,000 this year. We have distributed about $700,000 this year. We would like a license on a per-song basis.

HF: We wouldn't want that.

AA: We'll pay per cartridge regardless of the number of tunes.

HF: We have a problem in auditing industrial users of wired music. ASCAP has been cheated by these people. We have a new contract now, for such users. They are the only ones who pay on a percentage. They pay us 3½% of the amount that they pay Musak. It was previously 2½%. There are about 100 of these franchised users.

AA: We turned down a sale of 1400 units to an outfit who wanted to put on commercial announcements.

ASCAP gets $30 additional on a so-called storecasting contract, where they are going to make commercial announcements.

AA: There is some overlapping of tunes on the rhythmic and melodic albums. We would recommend a per-cartridge license concept. We have doubts about a blanket license.

HF: There would be a higher performing rate now, because you would be getting the "nuggets."

Burton here asked whether they could work out something for the present tapes.

HF: We can't do anything to jeopardize our present market unless the price is high enough. Writers should persuade publishers to go along.

Burton and I then commented that it would not be necessary to do much persuasion, because we feel that publishers would rather work through ASCAP.

AA: 3M would prefer a contract with ASCAP, other things being equal. In England PRS is receiving about $16 a year per subscription regardless of how many tapes are used. The users sign contracts with PRS, through 3M. 85% of the buyers of the machines are new users of music. I am going away and will be back around May 15. We can talk on May 20. Also, perhaps the meetings can include Mr. Herzog, the head of the Business Projects Division of 3M. Ray Lindgren is the project manager. Let ASCAP approach the publishers to go along with any deal ASCAP and 3M work out. We will try to come to a solution of the problems if we can.

LEON KELLMAN

/dlp

E 475

CBS v. ASCAP

Plaintiffs' Exhibit No. 133

Excerpt from "Report to New York AGAC Counsel from the West Coast Committee" dated 5/11/67.

RK AGAC COUNCIL FROM THE WEST COAST COMMITTEE ON ITS

MEETING HELD MAY 11, 1967 E 476

Present: HARRY RUBY
RAY GILBERT
BRONISLAW KAPER
VIC MIZZY
DONALD KAHN
GENE DePAUL
JIMMY McHUGH
HAROLD SPINA
HARRY TOBIAS
PAUL FRANCIS WEBSTER
RAY EVANS
NED WASHINGTON

These remarks immediately triggered similar complaints from other members present, with speculation on the substantial amount of interest gratuitously accruing to publishers as a result of such delays. After heated discussion, during which members expressed dissatisfaction with AGAC legal counsel who, instead of proposing and implementing aggressive action toward publishers, or suggesting methods of monitoring royalty payments, other than auditing (which is of

After heated discussion, Vic Mizzy volunteered to go to New York at his own expense to present these matters before the Council. When in further discussion it was pointed out that the serious questions presented could not be resolved over a lunch and, since a revision of organizational policy would require thoughtful and positive action by the New York Council, it was the unanimous decision of the West Coast Committee members present that this statement be sent to New York and that the Council be requested to present its position and state what specific action will be taken on the following matters:

CBS - Love Exh. 133 w/ 4/6/73

5. What positive action will be taken with regard to 3M?

CBS v. ASCAP

Plaintiffs' Exhibit No. 134

Letter dated 5/18/67 from Burton Lane to Vic Mizzy.

E 478

May 18, 1967

To Vic Mizzy:

Dear Vic,

I have studied the West Coast Committee report on its meeting held May 11, 1967. I was very disturbed by the tone of the report which must have reflected the atmosphere of your meeting.

I will restrict my answers to the points made in the report. (1) Delinquency of payment by The Big 3 and Aberbachs. I have just been informed by Sternie that copies of my letters sent to both publishers have been forwarded to you. These letters, if you will note, are dated the day before you held your meeting. I am also informed that Paul Francis Webster who claims he received rogghly $5.17 from Miller Music (and I am quoting the report now) was inaccurate by a rather wide margin. Did I say wide? I meant infinite. Checking into this I was informed that his royalties were more than $13,000.00.

(2) Regarding the 3M situation. When Miriam Stern was on the coast last year, she informed the West Coast Committee in the strictest confidence that we had taken steps to bring ASCAP and the 3M Corporation together so that they could negotiate a solution to the problems that were keeping them apart. After a meeting which was held here at our offices, (a meeting attended by Herman Finkelstein of ASCAP and Allen Arrow for the 3M Corporation, witnessed by Eddie Eliscu and me,) Eddie and I were disturbed by some of the things said at that particular meeting. We arranged to meet with Stanley Adams at the ASCAP office. The meeting at ASCAP was witnessed by Ned Washington and we informed Stanley and Ned what had taken place at the meeting in AGAC's office. I bring this up because I noticed that Ned Washington attended the West Coast meeting held on May 11, and yet there is no mention of the fact that Ned was aware of what we were doing to bring ASCAP and the 3M Corporation together. Furthermore, since that first meeting at our office between ASCAP and the 3M Corporation I have personally, on a half a dozen occasions, called Herman Finkelstein to find out what was happening. There are problems here which we (that is AGAC) cannot control. All we can do is use our influence to help solve this problem.

The accusations in your report are completely unfounded. I am referring to the statement and I quote " Another instance of counsel's defeatism and timidity was the 3M situation. It was the Committee's conviction that counsel's job is to challenge inequities to protect songwriters rather than to plead the case of the adversary and concede the battle before it is fought".

In the light of what I have told you and what you should have already known. how can that statement be justified?

CBS - Lowe Exh. 134-M 4/6/73

We do not like having our legal counsel attacked when there is absolutely not one iota of justification for it.

(3) The Nashville Situation.

Long before Harold Spina brought the Nashville situation to our attention we had already been involved in making plans to do something about this. There is a complicated situation here involving ASCAP. We do not want to do anything that might cast a bad light on ASCAP. We have been in touch with members of ours who live in Nashville and all I can say at this time is that the situation as described to you by Harold Spina is not quite accurate.

Vic, I think I should call this particular point to your attention and I say this because the last sentence of your report states: "The Committee after questioning him at length, unanimously moved that Harold Spina, because of his very intimate knowledge of the problems of the writers in that city, be sent to Nashville to recruit writers on behalf of AGAC." The West Coast Committee does not make policy. It can only recommend to the Council of AGAC action it wishes to have taken. It is the Council of AGAC only that can decide policy. The Council of AGAC will consider the recommendation the West Coast Committee has made in wanting to send Harold Spina to Nashville and will let you know after our next meeting how we have decided.

In the meantime let me restate what I have always felt and what the Council feels most strongly. We encourage all suggestions from the West Coast Committee because we believe very strongly that our interests are one but we must caution you not to jump the gun and assume that we are not aware of what is going on. We are always open to constructive criticism when it is justified but being human we resent unfair and unjust criticism.

My best personal regards to you and to all the other members of the West Coast Committee.

Burton Lane,
President

E 480

CBS v. ASCAP

Plaintiffs' Exhibit No. 135

Memorandum dated 7/25/67 from Burton Lane to AGAC West Coast Committee.

E 481

July 25, 1967

MEMORANDUM TO WEST COAST COMMITTEE

The report of the West Coast Committee meeting on June 28, 1967, at which the eight named members of the West Coast Committee were present, was taken up by our Council at its meeting on July 12, 1967.

There are legal statements and citations which I have asked Leon Kellman to reply to. In response, Leon has sent me a memo dated July 17, 1967 and I am attaching a copy to this memorandum.

The view of the Council, which I have been asked to transmit to you, is as follows:

It appears to our Council that this memo is concerned chiefly with the idea of hiring a lawyer on the West Coast to furnish legal services to members of the association at association expense. First, if we could do this legally, we would be glad to undertake this (aside from the matter of expense which is a serious problem and which we would have to go into at such time). But from Leon's memo, and from the situation as we have known it for a long time, nothing that has been said in your report changes the situation that an organization such as ours cannot give legal services or pay for them for its members or anyone else. The American Bar Association has begun a movement which may result in changing the law on this subject and Leon has been in very close touch with this situation. As a matter of fact, a draft of a report of the association on this subject actually has material referring directly to our association and based upon a letter that Leon has sent to them.

I want to take very great issue with reference to "organization weaknesses of AGAC" on the first page of the report. Just what are these organizational weaknesses? We would also very respectfully like to know just what is meant by "a progressive and agressive Council in California" as distinguished from the group of excellent men who are now serving us as the West Coast Committee in California? We would also like to know just how financing would create or affect a "progressive and agressive Council in California," other than the desire of some of our members to hire some lawyer (perhaps the one who furnished the statements which are in your report).

CAS- Some Exh. 135 w'

4/6/77

Prior to 1959, we did not have a collection plan. Prior to 1959, we were an organization which had a uniform contract and which tried in various ways to protect the rights of our members and to establish effective relations with publishers, something that we have always done quite effectively, despite our legal limitations. In 1959, our collection plan was adopted and in 1961 it became mandatory. Since that time, it has been a sensational success. Our collection plan is a unique and outstanding accomplishment and we are famous not only in this country but in other countries for what we have accomplished in this direction. It disturbs us here that in discussing AGAC you should ignore this accomplishment. We hope also that you appreciate the amount of time and effort on the part of our entire organization in developing and carrying out our collection plan as efficiently as it is done.

If there is any other activity which you desire and which is not now being carried on, and which can legally be done, we would like to know what it is. Any stronger activity which we carried on, would be an activity in which our members must join together and adopt a course of action from which none of them will deviate. This will be in violation of the anti-trust laws. You have only to look at the famous case of Ring v. Spina, in which Harold Spina was involved, to see that this is so, as the Dramatists Guild tried it and was hurt as a result.

The matter of the 3M situation was previously brought up. We did a very effective job in this direction and the statements which we issued, we think, had great effect in causing publishers to reconsider this question and refrain from participating. Further, as we have informed you, we took important steps to bring 3M and ASCAP together and we have good reason to believe that progress is being made. We accomplished a great deal in this respect. Anything else would have been illegal; 3M is a legitimate corporation engaged in a legitimate business. Our chief concern is that 3M's signing agreements with individual publishers concerning performing rights is inconsistent with the manner of doing business which writers prefer and publishers should prefer, that is, to receive performing royalties through performing rights societies, so far as that is legally possible.

E 483

I note a statement in your report about a "promised reduction in royalty collection fees." We are not aware of any promised reduction in the 4½% fee. We believe that we did a magnificent thing in being able to keep the fee down to 4½%. We do not see that it will be possible in the foreseeable future to reduce the fee below that sum. Indeed, by reducing the fee to 4½% we have put ourselves in the position where we sometimes do not have the money we would like to have for activities that we feel we should be undertaking. The Council, various committees, as well as our staff have excellent ideas to give further service to our members. However, we have to work within our limitations. Sufficient financial resources represent our biggest limitation.

Recommendations can be made to the Nominating Committee, but when you urge that 7 California members be put on the ballot, this is ⅓ of the entire ballot. It is impractical at this time (because it is not possible for us to pay for transportation) to put on the ballot such a predominant number of members who could not attend Council Meetings. All of those whom you suggest are on the West Coast Committee. Your help, suggestions and constructive criticism are conveyed to the Council through our exchange of Minutes and reports.

In connection with the copyright revision, we have played a most effective part. Our organization is highly thought of throughout the world, as Leon Kellman found when he was a member of the United States Delegation to the Berne Convention in Stockholm last month, and also on his trip to London (which he paid for at his expense) to talk to music people there. We have every reason to be proud of our organization as the spokesman for the songwriters of this country.

Our Council would very much like to know just what is meant by "notable lack of initiative by the organization in presenting forward-looking agressive programs." Aside from the idea of hiring a lawyer on the Coast and conducting activities which are in violation of the anti-trust laws, just what programs do you have in mind? I really would like to review this matter once and for all because I think that there has been a great deal of general language and a great deal of emotion which is not justified.

BURTON LANE

BL/cg

Burton Lane

E 484

CBS v. ASCAP

Plaintiffs' Exhibit No. 137

Excerpt of Report of the AGAC West Coast Committee Meeting dated 5/10/66.

E 485

REPORT OF WEST COAST COMMITTEE MEETING . MAY 10, 1966 . 12:00 Noon

Present: Committee Members:
Sammy Fain
Donald Kahn
Sammy Lerner
Jerry Livingston
Jimmy McHugh
Vic Mizzy
Don Raye
Harry Ruby
Ned Washington
Paul Francis Webster

Guests:
Eddie Beal
Bronislaw Kaper
Harry Tobias

Recommendation: That "song sharking" as an unfair practice be spelled out in the AGAC By-Laws and the question of publicizing specific cases be turned over to Leon Kellman to determine the legality of using names.

Because time was running out and the agenda was too long to be covered in one meeting, members present requested that the balance of the meeting be devoted to the 3M problem.

After lively discussion, during which Ned Washington presented the vast discrepancy between Muzak and 3M payments and reported that it was his understanding that 3M's future was rather dim since they were having difficulty in negotiating for the big catalogues originally anticipated, and other members expressed their views, it was felt that no new or concrete proposals had been forthcoming from New York.

CBS – Love Ed. 137¾
4/6/73

The members seemed most anxious to have a report of the response, if any, from publishers to the letter sent out by AGAC. Also, it was suggested that AGAC explore the possibility of deterring 3M through the trusteeship held by some AGAC members of mechanicals, in addition to the bulk sales clause which, it was recognized, is applicable only on AGAC contracts which represent a fraction of those involved. Mr. McHugh reported that all these avenues had been discussed and weighed in New York, but that he had received no encouragement.

The Committee strongly urged that the New York office submit a report on what action had been taken prior to the next West Coast Committee meeting the first week in June.

E 486

CBS v. ASCAP

Plaintiffs' Exhibit No. 162

Memorandum dated 10/19/59 from Miriam Stern to Alan Shulman enclosing Lane-Bernstein letters 10/2/59, 10/6/59, 10/14/59 and 10/15/69.

E 487

AMERICAN GUILD OF AUTHORS AND COMPOSERS
150 West 55th Street New York 19, N. Y.

ROUND TRIP LETTER

TO John Schulyman

DATE 10/19/59 SUBJECT Rufus - Bernstein

Enclosed is a copy of Louis Bir
letter to Burton - which I'd
add to the batch to bring up at
10/22 Council Meeting.

SIGNED Stevie DEPT.

REPLY:

DATE SIGNED

SIGN & REMOVE AND KEEP THIS COPY. SEND CARBON COPY SET WITH CARBON INTACT, FOR USE OF REPLIER.

CC:- Rose
10/13

PHONE CIRCLE 7-3553 LOUIS BERNSTEIN, PRESIDENT CABLE ADDRESS "BERNSTEIN" NEW YORK

E 488

SHAPIRO, BERNSTEIN & CO. INC.

Music Publishers

NO CONTRACT VALID UNLESS SIGNED BY AN OFFICER OF THE COMPANY

NEW ADDRESS
666 Fifth Avenue
New York 19, N.Y.
Tel: Circle 7-3553

October 15, 1959

Mr. Burton Lane, President
American Guild of Authors and Composers
158 West 55th Street
New York 19, New York

Dear Burton:

Thanks for yours of October 14th. Of course, I understand that you are now talking about television synchronization, but your first letter did not say so.

Now, as you well know, more and more television programs are being done on film and it looks like the time will come when there won't be much live television programing. If we had to contact writers for permission every time a song was going to be done on television, we would eventually find ourselves out of business. The producers who contact us want fast answers, and in any number of cases where we stalled them while waiting to contact writers for their consent, when we got back to the producer (promptly after receiving the consent of the writers), we were told to forget about it because he used something else in the meantime.

We usually try to get a good fee, but sometimes we make no charge in order to get more performances. Please bear in mind that the authors and composers who come into our office are desperately hungry for performances, which means money from ASCAP. A good number of writers have urged us to get them these performances and stop worrying about the AGAC technicalities. Even so, 19 out of 20 writers would gladly give us any authorization in writing, but since we are dealing with several thousand writers, it becomes a difficult job to be so technical.

I don't understand why this matter was brought up.

Sincerely yours,

Louis Bernstein

lb/tjg

RECEIVED OCT 19 1959

E 489

October 14, 1959

Mr. Louis Bernstein
Shapiro, Bernstein & Co., Inc.
666 Fifth Avenue
New York 19, New York

Dear Louis:

I have received your letter of October 6 concerning television licenses.

Apparently you misunderstood the AGAC letter of October 2, which refers to licenses issued by publishers and not to those granted by ASCAP.

The ASCAP licenses relate only to non-dramatic public performances for profit. However, publishers have been issuing licenses for the recording of songs on film or tape which is designed for use on television programs. Since the making of such recordings does not come within the ASCAP licenses, the consent of the writer is required under the SPA Agreement.

Trusting that this clears up the matter for you, I am

Sincerely,

Burton Lane
President

PHONE CIRCLE 7-3553 LOUIS BERNSTEIN, PRESIDENT CABLE ADDRESS "BERNSTEIN" NEW YORK

SHAPIRO, BERNSTEIN & CO. INC.

Music Publishers

NO CONTRACT VALID UNLESS SIGNED BY AN OFFICER OF THE COMPANY

NEW ADDRESS
666 Fifth Avenue
New York 19, N.Y.
Tel: Circle 7-3553

E 496

October 6, 1959

RECEIVED OCT 7 1959

Mr. Burton Lane, President
American Guild of Authors and Composers
158 West 55th Stree
New York 19, New York

Dear Mr. Lane:

I have several of your circular letters of October 1st, and I cannot imagine that you dictated this letter.

Every writer and publisher member of ASCAP has given ASCAP the right to grant permission to use on television songs written or published by them. Now you say that "some publishers have issued licenses for television use of a song without first obtaining the writer's written consent thereto".

If we were to ask the writer's consent for the million or more performances a year that we get, we and the songwriters would be out of business. There must be some mistake.

Cordially yours,

Louis Bernstein

lb/tjg

E 491

CBS v. ASCAP

Plaintiffs' Exhibit No. 405

Blanket Network Television License Agreement between NBC and ASCAP, cated 1/10/58 as of 1/1/58, covering the period 1/1/58 through 12/31/61 (furnished by ASCAP as Exhibit M in connection with ASCAP Answer, dated 6/30/70. to CBS Interrogatory 28).

E 492

BLANKET NETWORK TELEVISION LICENSE

AGREEMENT made between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (herein referred to as "SOCIETY") and NATIONAL BROADCASTING COMPANY, INC., a Delaware corporation (herein referred to as "LICENSEE") as follows:

1. A. SOCIETY grants to LICENSEE and LICENSEE accepts for a period commencing as of January 1, 1956, and ending December 31, 1961, a license to perform publicly or to cause to be performed publicly in the United States by television broadcasting on LICENSEE'S network television programs over or through any and all of LICENSEE'S affiliated stations, non-dramatic performances of the separate musical compositions heretofore copyrighted, composed or written by those members of SOCIETY listed in Schedule "A" attached hereto (as the same may be augmented from time to time) and now or hereafter during the term hereof in the repertory of SOCIETY, or hereafter during the term hereof copyrighted, composed or written by such members of SOCIETY, or of which SOCIETY shall have the right to license such performing rights. As additional members of SOCIETY hereafter grant to SOCIETY the right to license performances by means of television broadcasting, such additional members will be added to those listed in Schedule "A" as of the date upon which SOCIETY acquires such rights.

B. So long as LICENSEE shall fully perform each and all of its obligations hereunder, SOCIETY will not interfere with the transmission of LICENSEE'S network television programs to television broadcasting stations located in countries outside the United States; but nothing herein contained shall be deemed to grant to any television broadcasting station outside the United States the right to perform the compositions licensed hereunder, it being understood that such foreign stations must obtain licenses from the owners of the performing rights in the country in which such foreign stations are located.

C. This license does not extend to or include the public performance by television broadcasting or otherwise of any rendition or performance of (a) any opera, operetta, musical comedy, play or like production, as such, in whole or in part, or (b) any composition from any opera, operetta, musical comedy, play or like production (whether or not such opera, operetta, musical comedy, play or like production was presented on the stage or in motion picture form) in a manner which recreates the performance of such composition with substantially such distinctive scenery or costume as was used in the presentation of such opera, operetta, musical comedy, play or like production (whether or not such opera, operetta, musical comedy, play or like production was presented on the stage or in motion picture

form); provided, however, that the rights granted to LICENSEE under this agreement shall be deemed to include a grant of the right to make non-dramatic performances of compositions licensed hereunder by the television broadcasting of a motion picture containing such compositions if the rights in such motion picture other than those licensed under this agreement have been obtained from the parties in interest.

Nothing herein contained shall be deemed to license the public performance by television broadcasting of dramatic performances. Any performance of a separate musical composition which is not a dramatic performance, as defined herein, shall be deemed to be a non-dramatic performance. For the purposes of this agreement, a dramatic performance shall mean a performance of a musical composition on a television program in which there is a definite plot depicted by action and where the performance of the musical composition is woven into and carries forward the plot and its accompanying action. The use of dialogue to establish a mere program format or the use of any non-dramatic device merely to introduce a performance of a composition shall not be deemed to make such performance dramatic.

The definition of the terms "dramatic" and "non-dramatic" performances contained in this Sub-

paragraph "C" are purely for the purposes of this agreement and for the term thereof and shall not be binding upon or prejudicial to any position taken by either of the parties subsequent to the expiration thereof or for any purpose other than this agreement.

D. Except as expressly herein otherwise provided, nothing herein contained shall be construed as authorizing LICENSEE to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions licensed hereunder or as authorizing any receiver of any television broadcast to perform publicly or reproduce the same for profit, by any means, method or process whatsoever.

E. "The United States" as used in this agreement shall be deemed to include its territories, dependencies and possessions during the term hereof, including but not limited to Puerto Rico, Alaska, Hawaii, Virgin Islands and the Canal Zone. To the extent that and so long as SOCIETY has and directly exercises the right to license the non-dramatic public performance of musical compositions by television broadcasting in the Republic of the Philippines, the term "The United States" as used in this agreement shall include such Republic.

2. A. No license is hereby granted to broadcast programs over any station unless such broadcast is

given on such station as part of a network television program of LICENSEE. LICENSEE agrees to furnish to SOCIETY upon the execution of this agreement a list of all LICENSEE'S affiliated stations and to furnish on or before the tenth day of each month additional lists showing all LICENSEE'S affiliated stations as of the last day of the preceding month.

B. "Network television program" as used in this agreement shall be deemed to mean a program, whether or not such program shall include visual material, broadcast over two or more of LICENSEE'S affiliated stations simultaneously or by so-called "delayed" or "repeat" broadcasts (sometimes known as "rebroadcasts"). A network television program of LICENSEE may be originated at or by any affiliated station broadcasting such network television program regardless of the manner, means, or method of such origination. LICENSEE'S network television programs may also so originate in any place other than at such stations whether or not such other place is licensed to perform publicly for profit the compositions licensed hereunder, but nothing herein contained shall be deemed to grant a license to such place itself (or to the parties responsible for the performance therein) for the public performance for profit in such place of any such compositions.

C. "LICENSEE'S affiliated stations" or "affiliated stations" as used in this agreement shall be deemed to mean all television broadcasting stations in the United States which regularly broadcast LICENSEE'S network television programs or which appear on LICENSEE'S network television rate cards and which (a) are interconnected with LICENSEE'S television network by co-axial cable, wire, television relay or any other means whatsoever, or (b) pending the availability of such means of interconnecting the stations with the network at an expenditure which is not unreasonable in comparison with the cost of interconnecting LICENSEE's other affiliated stations, are parties to non-interconnected affiliation agreements with LICENSEE. Such stations shall only be deemed to be affiliated stations so long as they regularly broadcast such programs or appear on such rate cards, as the case may be. All television broadcasting stations in the United States which are owned and operated by LICENSEE and which broadcast LICENSEE'S network television programs shall be deemed to be affiliated stations for the purposes of this agreement, whether or not they appear on LICENSEE'S network television rate cards.

D. "LICENSEE'S occasional affiliated stations" as used in this agreement shall be deemed to mean television broadcasting stations not on LICENSEE'S television network rate cards to which LICENSEE only supplies network commercial television programs on the specific request of sponsors or to which LICENSEE only

supplies occasional network sustaining television programs of such national or public scope as a Presidential address or inauguration, addresses by internationally prominent governmental officials, a Eucharistic Congress, the launching of a battleship, or other sustaining television programs of equal public importance in the public interest, and such stations shall be deemed to be affiliated stations of LICENSEE solely for the purpose of such network commercial television programs or such occasional network sustaining television programs, as the case may be, and shall not be deemed affiliated with LICENSEE for any other purpose.

3. A. LICENSEE agrees to furnish to SOCIETY during the term of this agreement a list of all musical compositions (or, at the option of LICENSEE, a list of all musical compositions licensed hereunder) broadcast on network television programs of LICENSEE, showing the stations over which such programs are broadcast, the title of each composition and the composer and author thereof, and a brief notation of the scenery and costumes used.

B. At the request of SOCIETY, LICENSEE will furnish to SOCIETY the dialogue, if any, used in specified programs. SOCIETY will only ask for dialogue where it is reasonably necessary for its purposes. In cases where dialogue is only available in recorded form it will be sufficient for LICENSEES to permit SOCIETY to

screen the recording. When the dialogue is available in written form in any of the cities where SOCIETY has an office and it is inconvenient for LICENSEE to make an additional copy, it will be sufficient if LICENSEE permits a representative of SOCIETY to examine the file copy of the dialogue at LICENSEE'S office. LICENSEE will have no obligation to furnish SOCIETY with dialogue in cases where it does not have within its control either a written or recorded version of the dialogue.

C. With respect to motion pictures broadcast on network television programs of LICENSEE, LICENSEE'S obligations under Sub-paragraphs "A" and "B" of this Paragraph "3" shall be deemed to have been complied with if LICENSEE shall identify the picture for SOCIETY by its title, the name of the producer where available, and the copyright notice contained therein where available, and shall show the stations over which such programs are broadcast. If SOCIETY does not have a music cue sheet for such picture, and LICENSEE does have such a sheet, LICENSEE shall make such music cue sheet available to SOCIETY for examination at SOCIETY'S request and SOCIETY shall return such sheet to LICENSEE promptly.

D. The provisions of Sub-paragraphs "B" and "C" of this Paragraph "3" shall not limit LICENSEE'S obligation to cooperate with SOCIETY in connection with any claim, demand or action referred to on Paragraph "9A" of this agreement.

4. A. The members of SOCIETY shall have the right, at any time and from time to time, in good faith, to restrict the television broadcasting of compositions from musical comedies, operas, operettas and motion pictures, or any other composition being excessively broadcast, only for the purpose of preventing harmful effect upon such musical comedies, operas, operettas, motion pictures or compositions, in respect of other interests under the copyrights thereof; provided, however, that the maximum number of compositions which may be at any time thus restricted shall not exceed 750 and moreover that limited licenses will be granted upon application to SOCIETY entirely free of additional charge as to restricted compositions, if and when the copyright owners thereof are unable to show reasonable hazards to their major interests likely to result from such television broadcasting; and provided further that such right to restrict any such composition shall not be exercised for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition; and provided further that in no case shall any charges, "free plugs", or other consideration be required in respect of any permission granted to perform a restricted composition; and provided further that in no event shall any composition, after the initial television broadcast thereof, be restricted for the

purpose of confining further television broadcasts thereof to a particular artist, station, network or program.

B. SOCIETY reserves the further right, at any time and from time to time, in good faith, to restrict the television broadcasting of any compositions, over and above the number specified in the previous paragraph, only as to which any suit has been brought or threatened on a claim that such composition infringes a composition not contained in the repertory of SOCIETY or on a claim by a non-member of SOCIETY or by a member not listed in Schedule "A", as the same may be augmented from time to time, that SOCIETY does not have the right to license the public performance of such composition by television broadcasting.

5. A. In consideration of the license herein granted, LICENSEE agrees to pay to SOCIETY the following:

a. SUSTAINING FEE: For each calendar month during the term hereof a sum of TWELVE AND 50/100 DOLLARS ($12.50) for each of LICENSEE'S affiliated stations. No sustaining fee will be paid hereunder for LICENSEE'S occasional affiliated stations.

b. COMMERCIAL FEE: In addition, a sum equal

to 2-1/2% of its "net receipts from sponsors after deductions".

B. The term "net receipts from sponsors" as used in this agreement shall be deemed to mean the gross amount paid for the use of television broadcasting facilities for LICENSEE'S network television programs, as defined herein, less any advertising agency commission not to exceed 15% actually allowed to a recognized advertising agency not owned or controlled by LICENSEE, or, in the case of co-operative programs, by the affiliated station allowing such commission.

C. The term "net receipts from sponsors after deductions" as used in this agreement shall be deemed to mean net receipts from sponsors, less the sum of the following deductions:

a. The amount paid by LICENSEE to the American Telephone and Telegraph Company, or any other common carrier, for the facilities used by LICENSEE at any time during the term hereof in interconnecting LICENSEE'S affiliated stations (other than its occasional affiliated stations to which LICENSEE supplies occasional network sustaining television programs) for the purpose of broadcasting network television programs. In the event that LICENSEE obtains facilities for the inter-

connection of such affiliated stations for such purpose from any source other than the American Telephone and Telegraph Company or any other common carrier, then the cost to LICENSEE of such other facilities shall likewise be deductible. In the event that LICENSEE supplies its own facilities for the interconnection of such affiliated stations for such purpose, then the cost to LICENSEE of furnishing and operating such facilities shall likewise be deductible, but in no event shall such deduction exceed the amount which would have been deductible if common carrier facilities had been used for such purpose.

b. The actual cost of raw stock and processing of recordings of LICENSEE'S network television programs by so-called kinescope recordings (or other means used for the same purpose) for the purpose of furnishing such recordings to affiliated stations within the scope of the authorization contained in the letter attached as Exhibit "5" to the Network Letter, and of transporting such recordings to affiliated stations, less any amounts paid by such affiliated stations to LICENSEE for such recordings.

c. A sales commission on the net receipts from sponsors equal to 15% of such net receipts.

D. The term "gross amount paid for the use of television broadcasting facilities for LICENSEE'S network television programs" as used in this agreement shall be deemed to mean all payments made (whether in money or in any other form) by or on behalf of the sponsor of each program for the use of LICENSEE'S television broadcasting facilities for all such network television programs, after deducting only rate card discounts, quantity and/or frequency, actually allowed, and whether such payment shall have been made directly to LICENSEE or to any other persons, firms or corporations. Where merchandise, services or any thing or service of value is received in lieu of cash consideration for the use of LICENSEE'S network television broadcasting facilities, the same shall be described and the reasonable value thereof determined and accounting made to SOCIETY upon the same basis as if a regular billing had been made by LICENSEE therefor in a sum equal to such reasonable value which in no event shall be deemed to exceed LICENSEE'S prevailing published card rate for such television broadcasting facilities.

E. No payment shall be required hereunder with respect to bona fide charges for the use of facil-

ities furnished by LICENSEE to sponsors other than for time on the air, as such, provided:

a. that such charges are itemized separately when billed to the sponsors or their advertising agencies; and

b. that such charges are in addition to LICENSEE'S published applicable card rate (less applicable rate card discounts, quantity and/or frequency, actually allowed) for the use of LICENSEE'S television broadcasting facilities (i. e., time on the air) for the actual broadcast.

For the purpose of this Sub-paragraph "E", there shall be included in the term "LICENSEE'S published applicable card rate (less applicable rate card discounts, quantity and/or frequency, actually allowed) for the use of LICENSEE'S television broadcasting facilities (i. e., time on the air) for the actual broadcast" charges for facilities normally required at LICENSEE'S television network as a bona fide minimum for the television broadcast of a live studio program or a film program, as the case may be, excluding bona fide charges for rehearsal provided that they comply with the requirements of subdivisions "a" and "b" of this Sub-paragraph "E".

F. a. Co-operative programs are programs

which are furnished by LICENSEE to its affiliated stations under an arrangement permitting an affiliate to broadcast such programs on a sustaining basis or on a commercial basis under the sponsorship of a local, regional or national advertiser contracting directly with such affiliated station or its representative for the incorporation of the commercial credits of such advertiser into the program as broadcast by such affiliated station. For the purposes of this agreement only, and without prejudice to the position of SOCIETY or LICENSEE or of its affiliated stations as to the status of co-operative programs under SOCIETY'S non-visual broadcasting licenses, such co-operative television programs of LICENSEE shall be deemed to be LICENSEE'S network television programs covered by this agreement.

b. In the case of co-operative television programs the term "gross amount paid for the use of television broadcasting facilities for LICENSEE'S network television programs" as used in this agreement shall be deemed to mean the aggregate of the rate card rates therefor applicable to each of the particular sponsors (local, regional or national, as the case may be) and to the periods occupied by co-operative programs at the respective affiliated stations where such programs

are commercially sponsored, after deducting only rate card discounts, quantity and/or frequency, actually allowed, except that in the case of package sales of time and talent combined, the rate card discounts, quantity and/or frequency, to be deducted from the rate card rates shall be those applicable, in accordance with such affiliate's rate card, to each of the particular sponsors (local, regional or national, as the case may be) to whom such package sales are made and to the periods occupied by such co-operative programs at the respective affiliated stations where the programs which are the subject of such package sales are commercially sponsored, as certified to LICENSEE by such respective affiliates.

c. LICENSEE agrees that a condition of its supplying co-operative programs to any affiliated station with the right to sell such co-operative programs locally shall be that SOCIETY'S right to audit the books of such affiliated station under any local television agreement between SOCIETY and such affiliated station shall be deemed to extend to the matters specified in subdivision "b" of this Sub-paragraph "F" and any advertising agency commission deducted in accordance with the provisions of Sub-paragraph "E" of this Paragraph "5" with respect to such affiliated station in connection

with LICENSEE'S co-operative programs. In the event that such audit establishes that any certification by any affiliated station pursuant to subdivision "b" of this Sub-paragraph "F", or to Sub-paragraph "B" of this Paragraph "5", is incorrect, the amounts paid SOCIETY by LICENSEE based upon such certification shall be correspondingly adjusted, but no such adjustment shall be made as to broadcasts made more than thirty (30) months prior to receipt of notice from SOCIETY that a discrepancy exists between the amounts paid and payable hereunder with respect to such broadcasts.

G. No payment shall be required hereunder with respect to any sums received from political network television programs of LICENSEE, nor shall any payment be required with respect to broadcasts of LICENSEE'S network television programs over or through stations located outside the United States, and such foreign stations are not hereby granted any right to perform the compositions licensed hereunder.

H. No payment shall be required hereunder with respect to a network commercial television program of LICENSEE presented by a motion picture or by transcription if a license has been granted by SOCIETY (as distinguished from its members) at the

source to perform on such network commercial television program by means of such motion picture or by such transcriptic., as the case may be, the musical compositions embodied therein.

I. If any network television program of LICENSEE produced solely for broadcasting purposes is presented in a studio, auditorium or hall where an audience is admitted free of charge, or where the entire admittance charge is paid to an eleemosynary institution which shall request a gratuitous license from SOCIETY, no additional royalties or fees shall be charged by reason of the presence of such audience.

6. A. As to SUSTAINING FEE, LICENSEE shall on the twentieth day of each month during the term of this agreement pay to SOCIETY the monthly SUSTAINING FEE payable by LICENSEE to SOCIETY hereunder and such payments shall be accompanied by statements setting forth the basis upon which the computation is made.

B. As to COMMERCIAL FEE, LICENSEE shall render monthly statements to SOCIETY on or before the twentieth day of each month covering the period of the preceding calendar month, on forms supplied gratis by SOCIETY, with respect to all gross amounts paid for the use of television broadcasting

facilities for LICENSEE'S network television programs, and also showing all deductions in order to arrive at "net receipts from sponsors" and "net receipts from sponsors after deductions" as herein provided, without exception, and the percentage thereof payable to SOCIETY, which statements shall be accompanied by remittance due SOCIETY under the terms hereof.

C. Accountings and payments shall be made on a billing basis, with a right of deduction or rebate for bad accounts and discounts allowed or rebates paid. All billings made subsequent to the termination of this agreement with respect to network television broadcasts made during the term hereof shall be accounted for by LICENSEE as and when such billings are made by LICENSEE.

7. SOCIETY shall have the right, by its duly authorized representatives, at any time during customary business hours, to examine the books and records of account of LICENSEE only to such extent as may be necessary to verify any statement of accounting required pursuant hereto. SOCIETY shall consider all data and information coming to its attention as a result of any such examination of books and records as completely and entirely confidential.

8. Upon any breach or default by LICENSEE of

any terms herein contained relating to the reports, accountings or payments required to be made by LICENSEE, SOCIETY may give LICENSEE thirty (30) days' notice in writing to cure such breach or default, and in the event that such breach or default has not been cured within said thirty (30) days, SOCIETY may then promptly terminate this license.

9. A. SOCIETY agrees to indemnify, save and hold LICENSEE, its affiliated stations, sponsors and their advertising agencies, its and their artists, and each of them harmless, and defend LICENSEE, its affiliated stations, sponsors and their advertising agencies, its and their artists, and each of them from and against any claim, demand or suit that may be made or brought against them or any of them with respect to performances given on LICENSEE'S network television programs during the term hereof in accordance with this license of (a) "cleared compositions", or (b) musical compositions heretofore copyrighted, composed or written by members of SOCIETY listed in Schedule "A" as augmented from time to time and now or hereafter during the term hereof in the repertory of SOCIETY, or (c) musical compositions hereafter during the term hereof copyrighted, composed or written by such members of SOCIETY, or (d) musical compositions which SOCIETY shall hereafter certify

in writing to LICENSEE as musical compositions copyrighted, composed or written by such members of SOCIETY and included in SOCIETY'S repertory for the purposes of this agreement, or (c) musical compositions "deemed to be included in the repertory of SOCIETY" in accordance with the provisions of Sub-paragraph "C" of this Paragraph "9". In the event of the service upon LICENSEE of any notice, process, paper or pleading under which a claim, demand or action is made or begun against LICENSEE on account of any such matter as is hereinabove referred to, LICENSEE shall promptly give SOCIETY written notice thereof and simultaneously therewith deliver to SOCIETY any such notice, process, paper or pleading, or a copy thereof, and SOCIETY at its own expense shall have sole charge of the defense of any such action or proceeding. LICENSEE, however, shall have the right to engage counsel of its own, at its own expense, who may participate in the defense of any such action or proceeding and with whom counsel for SOCIETY shall cooperate. LICENSEE shall cooperate with SOCIETY in every way in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein, and shall execute all pleadings, bonds or other instruments, but at the sole expense of SOCIETY, that may be required in order properly to defend and resist

any such action or proceeding, and prosecute any appeals taken therein. In the event of the service upon LICENSEE of any notice, process, paper or pleading under which a claim, demand or action is made or begun against LICENSEE on account of the performance on LICENSEE'S network television programs of any musical composition (other than a "cleared composition") contained in the repertory of SOCIETY but not heretofore or hereafter during the term hereof copyrighted, composed or written by members of SOCIETY and not certified by SOCIETY as a musical composition copyrighted, composed or written by members of SOCIETY, SOCIETY agrees at the request of LICENSEE to cooperate with and assist LICENSEE in the defense of any such action or proceeding, and in any appeals that LICENSEE may elect to take from any judgments or orders entered therein.

B. As used in this Paragraph "9", a "cleared composition" shall mean any composition in the repertory of SOCIETY, not copyrighted, composed or written by a member of SOCIETY, which SOCIETY shall have notified LICENSEE is a composition with respect to which SOCIETY is willing to indemnify LICENSEE, provided that the performance of such composition shall be made on the specific network television program of LICENSEE for which a clear-

ance shall have been given by SOCIETY; provided further, however, that in the event that SOCIETY notifies LICENSEE in writing that it is willing to clear such a composition without limitation to a specific program, such composition shall thereafter be regarded as a "cleared composition" until such time as SOCIETY shall rescind such clearance.

C. For the purpose of this Paragraph "9" only, any musical composition (other than a musical composition or group of musical compositions expressly excepted therefrom or that may be restricted because of the operation of Paragraph "4" hereof) which is listed in

(a) the perforated sheets known as the "ASCAP Index" previously furnished by SOCIETY to LICENSEE, or

(b) the bound volume entitled "ASCAP Index 1952", or

(c) the bound volume entitled "ASCAP Supplement Index 1954",

as the same may have been revised heretofore or as the same may hereafter be revised, as a musical composition heretofore copyrighted by a present member of SOCIETY listed in Schedule "A" as such list of present members may be augmented from time to time shall be deemed to be included in the repertory of SOCIETY. SOCIETY

shall have the right to make reasonable revisions in such Indices from time to time, provided, however, that no such revision and no exception referred to above shall be effective as to any broadcast of LICENSEE'S network programs made, or delayed or repeat broadcasts thereof scheduled, prior to the date on which LICENSEE shall have received notice of such revision or exception. Nothing in this Sub-paragraph "C" shall be deemed to limit LICENSEE'S rights or to limit or affect LICENSEE'S obligations to pay the license fees payable under this agreement or to limit SOCIETY'S obligations to indemnify as provided in Sub-paragraph "A" of this Paragraph "9".

D. The provisions contained in this Paragraph "9" shall apply to LICENSEE'S affiliated stations, sponsors and their advertising agencies, and its or their artists, as to LICENSEE'S network television programs with the same effect as if in each instance there had been added to "LICENSEE" the words "its affiliated stations, sponsors and their advertising agencies, its and their artists, and each of them."

10. SOCIETY agrees during the term hereof to maintain for the service of LICENSEE substantially SOCIETY'S present repertory of compositions copyrighted, composed or written by present members of SOCIETY, list-

ed in Schedule "A" as such list of present members may be augmented from time to time. In case there shall be a substantial diminution, by reason of action by SOCIETY or any such members, in the use which LICENSEE may make of compositions copyrighted, composed or written by such members of SOCIETY as compared to the use which LICENSEE customarily has been permitted to make of such compositions prior to the actual execution of this agreement or in case there shall be a substantial diminution in SOCIETY'S present repertory of compositions copyrighted, composed or written by present members of SOCIETY listed in Schedule "A" as such list of present members may be augmented from time to time, LICENSEE may give SOCIETY thirty (30) days' notice in writing to cure such substantial diminution. In the event that such substantial diminution in use or repertory has not been cured within said thirty (30) days, LICENSEE may then promptly terminate this agreement. If LICENSEE does not so terminate, LICENSEE shall have the right to obtain a reduction, as hereinafter provided, in the percentage payable on its "net receipts from sponsors after deductions" proportionate to such substantial diminution in use or repertory.

In the event that (a) such a substantial diminution in use or repertory shall have occurred and LICENSEE

shall have notified SOCIETY thereof, and (b) SOCIETY shall not have cured such diminution within thirty (30) days thereafter, and (c) SOCIETY and LICENSEE shall be unable to agree within such thirty (30) days either as to the existence of such a diminution as would justify a decrease in the license fees payable hereunder or as to the appropriate reduction in the percentage payable on LICENSEE'S "net receipts from sponsors after deductions" by reason of such diminution, and (d) LICENSEE shall not have terminated this agreement as herein provided, the controversy shall be determined by arbitration as herein provided.

In the event that such a substantial diminution in use or repertory shall have been determined to exist as herein provided and thereafter SOCIETY shall have cured such diminution, SOCIETY shall have the right to obtain, as herein provided, the restoration of any reduction theretofore made in the license fees payable under this agreement by reason of such diminution. In the event that SOCIETY shall notify LICENSEE that in SOCIETY'S opinion any substantial diminution in use or repertory shall have been cured and within thirty (30) days thereafter SOCIETY and LICENSEE shall be unable to agree as to whether or not such diminution shall have been cured, the controversy shall be determined by arbitration as herein provided.

Any award of the arbitrators with respect to any controversy submitted to arbitration under this Paragraph "10" and reducing or restoring the percentage payable by LICENSEE hereunder shall be effective as of whichever shall be the later of (a) the date on which LICENSEE or SOCIETY, as the case may be, shall have given the other notice of such substantial diminution in use or repertory or the curing thereof, or (b) the date, if any, which the arbitrators shall specify as the date on which such diminution occurred or was cured.

In case any controversy is to be determined by arbitration as provided above, such arbitration shall be conducted under and pursuant to the laws of the State of New York, in accordance with the provisions of Paragraph "11" hereof.

In case the arbitrators shall determine that there has been such a substantial diminution in use or repertory and shall make an award reducing the percentage payable by LICENSEE on its "net receipts from sponsors after deductions", the reduction in such percentage payable by LICENSEE made by such award shall in no event be greater than the participation in such percentage payments of the publisher member or members of SOCIETY whose catalogue or catalogues shall have been the subject of such

substantial diminution in use or repertory. The participation of such publisher member or members in such percentage payments made by LICENSEE hereunder shall be deemed to be the same percentage of such payments by LICENSEE as the percentage which such publisher member's or members' [illegible] from SOCIETY in respect of television distribution for the year immediately preceding shall bear to the entire distribution of royalties in respect of television by SOCIETY to all of its publisher members during such year.

11. In the event that during the term of this agreement there is to be determined by arbitration hereunder whether there has been such a substantial diminution in use or repertory and, if so, the percentage by which the license fees payable hereunder shall be reduced by the reason thereof, or whether a substantial diminution has been cured, as the case may be, as provided in Paragraph "10", each party shall on written notice to the other appoint an arbitrator within two (2) weeks after the expiration of the applicable thirty (30) day period specified in Paragraph "10" hereof.

In the event that within ten (10) days after the giving of such notice by one party, the other shall not by written notice appoint another arbitrator, then upon

the written request of either party (or both) the person who is at the time performing the functions of President of the American Arbitration Association shall appoint the second arbitrator. When two arbitrators have been appointed they shall, if possible, agree upon a third arbitrator and shall appoint him by notice in writing, in triplicate, signed by both of them, one of which triplicate notices shall be given to each party hereto. If ten (10) days shall elapse after the appointment of the second arbitrator without notice of the appointment of the third arbitrator having been given, then upon the written request of either party (or both) the person who is at the time performing the functions of President of the American Arbitration Association shall appoint the third arbitrator. Upon appointment of the third arbitrator the three arbitrators shall hold a hearing and give opportunity to each party hereto to present his case in the presence of the other, and shall then make their award determining the license fees which shall be paid by LICENSEE to SOCIETY, taking into consideration all applicable factors which tend to determine whether there has been such a substantial di nution and, if so, the extent thereof and the percentage by which the license fees payable hereunder shall be reduced by

reason thereof, or whether a substantial diminution has been cured, as the case may be, as provided in Paragraph "10". The arbitration shall be conducted in accordance with the rules of the American Arbitration Association then in effect.

The award of the majority of the arbitrators shall be binding upon the parties hereto, judgment may be entered thereon in any court having jurisdiction, and this agreement shall be deemed to be modified accordingly. Such award shall include the fixing of the expenses of the arbitration, which shall be borne equally by both parties.

12. In the event of any major interference with the operations of LICENSEE'S television network due to governmental measures or restrictions, LICENSEE shall have the right to terminate this agreement upon seven (7) days' notice.

13. All notices required or permitted to be given by either of the parties to the other hereunder shall be duly and properly given if mailed to such other party by registered United States mail addressed to such other party at its main office for the transaction of business.

14. This agreement shall enure to the benefit

of and shall be binding upon the parties hereto and their respective successors and assigns, but no assignment shall relieve the parties hereto of their respective obligations hereunder as to performances broadcast, acts done and obligations incurred prior to the effective date of the assignment.

IN WITNESS WHEREOF, this agreement has been duly executed by SOCIETY and LICENSEE this 10th day of January, 1958, as of the 1st day of January, 1958.

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

By Paul Cunningham Pres

NATIONAL BROADCASTING COMPANY, INC.
Licensee

By James A. McConnell

E 523

January 1, 1956

(NETWORK LETTER)

To National Broadcasting Company, Inc.
New York City

This letter is being executed simultaneously with a network television license agreement between us of even date and shall be deemed to be a part thereof.

I. The requirement of Paragraph "3 A" of such agreement that you list the compositions broadcast on network television programs and the stations over which network television programs are broadcast shall be deemed to have been complied with by your continuing to furnish to us the same types of reports as you have furnished under the present non-visual broadcasting agreements between us.

Without affecting the provisions of Paragraph "3 C" the requirement of Paragraph "3 A" with respect to a brief notation of scenery and costumes shall be deemed to have been complied with if you furnish us a notation with respect thereto similar to the forms hereto attached as Exhibits "1", "2", "3" and "4".

II. Referring to Paragraph "4 A", which provides that a maximum of 750 compositions may be restricted for the purposes therein set forth, SOCIETY agrees that it will use its best efforts to keep the number of compositions on the restricted list down to a minimum, and if possible, substan-

tially below the figure of 750. The practices with reference to the restriction of compositions followed under the present non-visual broadcasting license agreements between us shall be applicable to such network television license agreement. The practices with respect to any composition withdrawn as a result of any revision of the Indices shall be the same in respect of prior notice and effective date as the practices with reference to the restriction of compositions.

III. SOCIETY agrees not to enter into, recognize as valid, or perform any performing license agreement which shall result in discriminating in price or terms between LICENSEE and other licensees similarly situated unless it first offers to modify this agreement to conform to the prices and terms of such agreement with such other licensees and gives LICENSEE ample opportunity to accept such modification provided, however, that differentials based upon applicable business factors which justify different prices or terms shall not be considered discriminations within the meaning of this Paragraph "III"; and provided further that, if as a result of a judicial decision or arbitration award fixing different prices or terms than those provided for in said agreement between us of even date, a performing license agreement in accordance therewith shall be entered into between SOCIETY and any other network television broadcaster similarly situated at such different prices or

terms, then the judicial decision or arbitration award determining such prices and terms shall be binding only upon the parties to the proceeding in which such decision or award is made, and SOCIETY shall not be required to offer such prices and terms to LICENSEE; and provided further, that if such decision or award shall result in the grant by SOCIETY to such other network television broadcaster of a broader license (i.e., a license providing for a wider scope of use or lesser restrictions thereon) than that provided for in said agreement between us of even date, then such broader license shall be made available to LICENSEE upon the terms and conditions provided for in such decision or award, except that in such event the license fee payable by LICENSEE to SOCIETY shall be that which is payable under Paragraph "5" of said agreement between us of even date, or that which is fixed in such decision or award, whichever shall be higher.

IV. SOCIETY agrees in connection with the publishers' letters accompanying the Blanket Network Television Licenses to request and to use its best endeavors to obtain extensions of such grants for the period from January 1, 1958 to December 31, 1961, in the form attached hereto as Exhibit "5".

Very truly yours,

AMERICAN SOCIETY OF COMPOSERS
AUTHORS AND PUBLISHERS

By Paul Compton Pres.

ACCEPTED AND AGREED TO:

NATIONAL BROADCASTING COMPANY, INC.
Licensee

By Donald H. Macdonnell

EXHIBIT "1"

BONNY MAID VERSATILE VARIETIES

WNBT (DATE OF PROGRAM) 9 PM

THEME: THE CAMPBELLS ARE COMING (SPEC LYRICS) (PD)

THE SKEPTICS - COMEDY PANTOMIME TEAM - NIGHTCLUB SET - EVENING CLOTHES (ALL NUMBERS INSTRUMENTAL BACKGROUND)

1. SPRING SONG — MENDELSSOHN (PD)
2. SCHOOL DAYS — (MILLS)
3. HONEYSUCKLE ROSE — (SANTLY)
4. SILVER THREADS AMONG THE GOLD — (CRAWFORD)

UNDER TWINS - COMEDY DANCE & SONG TEAM - NIGHT CLUB SET - EVENING CLOTHES

1. SOPHISTICATED LADY — (MILLS) INST. BG
2. MARGIE — (MILLS) VOC

LEONNE HALL - VOCALIST - NIGHT CLUB SET - EVENING CLOTHES

1. IT'S A BIG WIDE WONDERFUL WORLD — (BMI)
2. THE BOY NEXT DOOR — (FEIST)

ARLEIGH PETERSON TRIO - DANCER SINGER & VOODOO DRUMMER - NIGHT CLUB SET - VOODOO AFRICAN COSTUME

1. BABALU — (PEER) VOC
2. ELUBE CHANGO — (PEER) INST. BG

GEORGE GIVOT - COMEDY VOCALIST - NIGHT CLUB SET - EVENING CLOTHES

1. THE GREEK AMBASSADOR — GEORGE GIVOT (MS) VOC.

SIG:
CONTACT: ZALANTIS
(DATE PROGRAM TYPED)

E 527

EXHIBIT "2"

MOHAWK SHOW ROOM

WNBT (DATE OF PROGRAM) 7:30 PM

SIG: IRISH WASHERWOMAN (PD)

MORTON DOWNEY - BAND STAND SET - STREET CLOTHES -
(ALL NUMBERS VOCAL)

1. BLUE SKIES (BERLIN)
2. DON'T BLAME ME (ROBBINS)
3. IT'S MY DESIRE (DORSEY)
4. SUNNY SIDE OF THE STREET (SHAPIRO)

SIG:
CONTACT: ZALANTIS
(DATE PROGRAM TYPED)

E 528

EXHIBIT "3"

KUKLA FRAN AND OLLIE

WNBT (DATE OF PROGRAM) 7:00 PM

SIG:	HOP HOP HOP	(PD)	
	SUB THEME	FASCINATO	(MS)
	EXIT MUSIC	FASCINATO	(MS)

PUPPET SET

1.	MORNING ON THE FARM	(LEEDS)	VOCAL
2.	COUNTRY STYLE	(B & VH)	INST. BG.
3.	OLE DAN TUCKER	(PD)	VOCAL

SIG:
CONTACT: ZALANTIS
(DATE PROGRAM TYPED)

E 529

EXHIBIT "4"

THE BIG STORY

WNBT (DATE OF PROGRAM) 9:30 P.M.

SIG.	THE BIG STORY	VLADIMIRI SELINSKY	(MS)
1.	SHORES OF SORRENTO	R STRAUSS	VICTOR 18535 (PD)
2.	TOD UND VERKARUNG	R STRAUSS	VICTOR 8290 A (PD)
3.	SYMPHONIE MODERNE	STEINER	VICTOR 11-8303 (REMICK)
4.	SYMPHONY #5	PROKOFIEFF	VICTOR 11-9442 A (PD)
5.	ADVENTURES IN A PERAMBULATOR	J.A. CARPENTER	VICTOR 84.57 (G.SCHIRMER)
6.	FIREBIRD SUITE	STRAVINSKY	VICTOR 16697 (PD)
7.	TAPIOLA	SIBELIUS	VICTOR 12-0950 (B & H)
8.	NETWORK CUES:		
	DRAMATICS I CUT 12 'D 7 MM	8560	N B C PROPERTY
	CURTAINS II CUT 8 "	8662	N B C PROPERTY
	MYSTERIOUS VI CUT 12 "	8658	N B C PROPERTY
	DRAMATICS II CUT 4	8651	N B C PROPERTY
	CURTAINS I CUT 12	8651	N B C PROPERTY

SIG:

NOTE: ALL MUSIC USED AS BRIDGES AND INCIDENTAL BACKGROUND

CONTACT: ZALANTIS
1-1-54

EXHIBIT "5"

National Company
Columbia Broadcasting System, Inc.
~~505 Madison Avenue~~
New York 22, N. Y.

We refer to the network television music performing rights license agreements which are about to be entered into between you and the American Society of Composers, Authors and Publishers (hereinafter called "SOCIETY"). We both recognize that delayed and repeat broadcasts (i.e., broadcasts over certain affiliated stations subsequent to the original broadcast) of network television programs are often necessitated by time differentials and other circumstances such as unavailability of facilities, conflicting program schedules, etc. Also, the coaxial cables connecting television stations are still in the early stages of development, and it is not now -- and may not be for several years -- possible to connect by cable all of the television stations affiliated with the several networks. Consequently, you have asked the publisher members of SOCIETY to grant you the right to make and cause to be made kinescope recordings under certain specified conditions, as hereinafter set forth, and you have stated that the grant of such right is a condition precedent to your executing the aforementioned license agreements with SOCIETY.

Accordingly, we hereby grant you, during the entire term of such license agreements (that is, until December 31, 1961) or until the date of prior termination of such license agreements, and without the payment of any fees, the following rights:

(a) To make or cause to be made simultaneously with any original broadcast consisting (1) of live performances or (2) of live performances accompanied in part by other material, of any of your network television programs containing performances of musical compositions

(i) licensed under the aforementioned license agreements, and

(ii) now or hereafter owned or controlled by us,

recordings of such program, as broadcast, for the limited purposes set forth in sub-paragraph (b) below; and

(b) To use such recordings or cause the same to be used (i) for reference, file and private audition purposes, (ii) for making one broadcast (delayed or repeat) over each of such of your affiliated network television stations (including company-owned stations) as did not broadcast the program simultaneously with the original broadcast, provided that such broadcast is made within a period of 60 days after the date of such original broadcast, and provided further that any such delayed or repeat broadcasts shall not be made for any purpose other than to complete the network broadcast of such program, and (iii) for making a "trailer" or excerpt utilizing a portion of any such recording not exceeding two minutes in duration, to be broadcast by television over your television network and any of your affiliated stations (including company-owned stations) for the purpose of advertising and promoting the broadcast over your television network and such respective stations of the program series of which the recorded broadcast shall be a part, provided that no such trailer or excerpt shall be broadcast subsequent to the broadcast of the last program in such series during the term of such license agreements.

It is also recognized that on some occasions scheduled original network broadcasts may be pre-recorded for one time use in lieu of live broadcast. Accordingly we hereby grant you during the term provided for above, the following rights:

(a) To make or cause to be made in advance of any of your scheduled original network broadcasts consisting (1) of live performances or (2) of live performances accompanied in part by other material, of any such scheduled original network television program containing performances of musical compositions

(i) licensed under the aforementioned license agreements, and

(ii) now or hereafter owned or controlled by us,

recordings of such program, as scheduled expressly for such original network broadcast, for the limited purposes set forth in sub-paragraph (b) below; and

(b) To use such recordings or cause the same to be used

(i) for making one network television broadcast over your television network and

(ii) for making one broadcast (delayed or repeat) over each of such of your affiliated network television stations (including company-owned stations) as did not broadcast the program simultaneously with the original broadcast of such pre-recorded program, provided that such broadcast is made within a period of 60 days after the date of such original broadcast, and provided further that any such delayed or repeat broadcasts shall not be made for any purpose other than to complete the network broadcast of such programs, and

(iii) for making a "trailer" or excerpt utilizing a portion of any such recording not exceeding two minutes in duration, to be broadcast by television over your television network and any of your affiliated stations (including company-owned stations) for the purpose of advertising and promoting the broadcast over your television network and such respective stations of the program series of which the recorded broadcast shall be a part, provided that no such trailer or excerpt shall be broadcast subsequent to the broadcast of the last program in such series during the term of such license agreements,

provided, in the case of recordings of material other than live performances, this grant shall not be deemed to modify, alter, or suspend in any way limitations existing with respect to the material so recorded.

Very truly yours,

_____

By_____

E 533

CBS v. ASCAP

Plaintiffs' Exhibit No. 430

ASCAP Supplementary Answer, dated 3/15/73, to CBS Interrogatory No. 26.

Copy: Prepared by CSM

E 534

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,	69 Civ. 5740 (M.E.L.)
-against-	ASCAP'S SUPPLEMENTARY ANSWER TO PLAINTIFF'S INTERROGATORY 26
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., Defendants.	

Defendant American Society of Composers, Authors and Publishers ("ASCAP") hereby supplements its answer, dated October 21, 1970, to plaintiff's Interrogatory 26, dated March 18, 1970, pursuant to Magistrate Raby's decision, dated November 29, 1972, subject to the understanding that in providing the following answer ASCAP reserves all objection to the relevancy and materiality of said Interrogatory, or any part thereof, to any issue in the case, and reserves its right to object to any of the other parts of said Interrogatory. The supplementary answer herein contains the best information presently available and ASCAP reserves the right to amend or supplement this answer if and when it has other or more accurate information.

Interrogatory 26

Describe in full detail each formula, guideline, index, rule of thumb or other basis employed by the Society to determine the amount to be charged, and the royalty base on which to charge, each of the following categories of users of music for the right to perform publicly for profit any, some or all the musical compositions in the Society's pool:

(a) television networks;

(b) television stations;

(c) radio networks;

(d) radio stations;

(e) "talk" and/or "news" radio stations (as those terms are generally understood in the industry);

(f) wired music and related service companies;

(g) theaters;

(h) hotels;

(i) nightclubs;

(j) restaurants;

(k) orchestras; and

(l) any other use of music (identifying each)

Answer

ASCAP seeks to obtain the highest fees it believes are reasonable. It takes into consideration the factors it thinks the Court would consider if a proceeding were instituted by a user under Section IX of the 1950 Amended Final Judgment. Among these factors are the history of rates, and ASCAP's experience with users.

STATE OF NEW YORK,)
) ss.:
COUNTY OF NEW YORK,)

HERMAN FINKELSTEIN, being duly sworn, states that he is General Counsel of THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, an unincorporated association, one of the defendants herein; that he has read the foregoing supplemental answer to plaintiff's interrogatory 26; and that said answer was prepared under his direction and is true and correct to the best of his information and belief.

[Herman Finkelstein]
HERMAN FINKELSTEIN

Sworn to before me this
15th day of March 1973

[Henry Hopschuster]
Notary Public

CBS v. ASCAP E 537

Plaintiffs' Exhibit No. 442

Form of BMI publisher affiliation agreement used from January 1959 to March 1969 (furnished by BMI as Exhibit 1 in connection with BMI Answer, dated 3/26/71, to CBS Interrogatory No. 9).

BMI

E 538 1/59-3/69

AGREEMENT made this day of 19 , between BROADCAST MUSIC, INC., a New York corporation, whose address is 589 Fifth Avenue, New York 17, N. Y. (hereinafter called "BMI") and _____ a corporation _____ doing business under the firm name and style of _____ whose address is _____ (Street or Avenue) (City) (State) (hereinafter called PUBLISHER").

WITNESSETH:

FIRST:

(a) The word "term", as used in this agreement shall mean and be restricted to a period of five (5) years from the date hereof and continuing thereafter unless cancelled by either party at the end of the said five-year period, or at the end of any subsequent five-year period upon three (3) months' advance written notice;

(b) The word "works," as used in this agreement, shall mean and be restricted to all musical compositions, including individual compositions embraced within a dramatico-musical composition, whether published or unpublished, now owned or copyrighted, or hereafter during the term, acquired or copyrighted by Publisher, and all such musical compositions, whether published or unpublished, in which Publisher now, or hereafter during the term, owns or controls the right publicly to perform for profit or the right to broadcast or televise.

SECOND: Publisher hereby sells, assigns and transfers to BMI, its successors and assigns, the following rights in all works, including but not limited to the work itemized in Schedule A annexed hereto and made a part hereof:

(a) The sole and exclusive right publicly to perform for profit, broadcast and televise, including the right to grant licenses publicly to perform for profit, broadcast and televise;

(b) The non-exclusive right to adapt, arrange, translate, change and dramatize for performing, broadcasting and televising purposes, including the right to grant non-exclusive licenses to adapt, arrange, translate and dramatize for performing, broadcasting and televising purposes;

(c) The non-exclusive right to record, or to cause or permit to be recorded, for mechanical, electrical or other reproduction, performance of said works in any form or in any adaptation, arrangement, translation or dramatization thereof, but not for motion picture synchronization, upon payment of the customary royalty rate then prevailing, but in no event in excess of present statutory royalties;

(d) The rights hereby conveyed under subdivisions (a), (b) and (c) hereof shall be exercised by BMI and/or its licensees only within the Western Hemisphere.

THIRD: In consideration of this agreement, BMI agrees to pay Publisher the following:

(a) Two cents (2¢) per performance by a commercial amplitude modulation United States broadcasting station licensed by BMI of each original work printed in the United States either in customary saleable form or in professional copies provided that said printings are in such quantities as make copies of said work generally available to broadcasts either without charge or at the customary price for such material;

(b) One cent (1¢) per performance by a commercial amplitude modulation United States broadcasting station licensed by BMI of each unpublished work (or published work which is not printed in accordance with subdivision (a) of this paragraph "THIRD") which has been recorded on phonograph records, distributed throughout the United States and available to broadcasters at customary phonograph record prices;

(c) One cent (1¢) per performance by a commercial amplitude modulation United States broadcasting station licensed by BMI of any copyrighted arrangement of a work in the public domain embraced within this agreement and printed in the United States in accordance with subdivision (a) of this paragraph "THIRD."

(d) The aforesaid payments shall be made irrespective of whether the performances referred to in subdivisions (a), (b) and (c) of this paragraph "THIRD" are by means of recordings or by living talent.

In the event that BMI shall hereafter pay, or agree to pay, royalties in excess of those set forth herein for works of the same type as are embraced within this agreement and acquired by BMI under substantially identical agreements, and in the event that BMI shall not tender to Publisher a modification of this agreement making available to said Publisher said more favorable rates, Publisher shall have the right to terminate this agreement by giving BMI notice in writing, which notice shall be effective to so terminate this agreement sixty (60) days after its receipt by BMI, provided, however, that BMI may, within the said sixty day period, tender to Publisher an agreement containing said more favorable rates and upon such tender, any notice of termination theretofore given by Publisher shall be deemed to have been withdrawn.

FOURTH:

(a) The performance by commercial amplitude modulation United States broadcasting stations licensed by BMI, refered to in paragraph "THIRD" hereof, for which payment shall be made, shall consist of not less than a full chorus of a work. The number of such performances shall be estimated by BMI as accurately as shall be practicable from an actual check of performance records furnished to BMI by broadcasting stations constituting a representative cross-section of the industry;

(b) A statement showing the number of performances as computed by BMI pursuant to the provisions of subdivision (a) of this paragraph "FOURTH" and remittances of payments by BMI to Publisher with respect to the same, shall be furnished by BMI to Publisher at least twice during each calendar year during the term.

FIFTH:

(a) BMI shall have the right, upon written notice to Publisher, to exclude from the terms of this agreement, at any time, any work which, in its opinion (1) is similar to a previously existing work and might constitute an infringement thereof, (2) is similar to the title or music or lyrics of a previously existing work and which might constitute unfair competition with respect to such work, (3) is offensive, in bad taste, or against public morals, or (4) is not reasonably suitable for performance;

(b) In the case of arrangements of works in the public domain, BMI shall have the unrestricted right to exclude such arrangements from the terms of this agreement;

(c) In the event that any claim is made by a third party with respect to any work covered by this agreement, BMI shall have the right to exclude such work from the terms of this agreement until such time as the claim shall have been withdrawn or otherwise disposed of;

(d) In the event that any work is excluded pursuant to the provisions of subdivisions (a) or (b) of this paragraph "FIFTH," all rights in such work shall automatically revert to Publisher.

SIXTH: Publisher further covenants and agrees as follows:

(a) To submit to BMI supplements to Schedule A setting forth, with respect to additional works acquired by Publisher, (1) the titles of such works as are printed in accordance with subdivision (a) of paragraph "THIRD" hereof, (2) the titles of such works as are not so printed in accordance with subdivision (a) of paragraph "THIRD" hereof, (3) the name or names of the authors or composers of each individual work, (4) the United States copyright registration number of each work and the publication date, if any, and (5) the titles of works which have been recorded on phonograph records, including the manufacturer's name, catalog number and the name of the recording artist;

(b) To furnish promptly to BMI, from time to time during the term hereof, manuscript copies of all unpublished works;

(c) To furnish promptly to BMI, from time to time during the term hereof, not less than three (3) copies of each printed version of all works embraced within this agreement and with respect to works recorded on phonograph records, to furnish promptly to BMI a copy of each of said records;

(d) To obtain and deliver to BMI any written agreements, assignments, instruments or documents of any kind with respect to any works embraced within this agreement which BMI may require, and to procure and maintain at least United States copyright protection with respect to all published works embraced within this agreement.

SEVENTH: BMI agrees, after ascertaining the suitability of a work pursuant to subdivision (a) of paragraph "FIFTH" hereof, to inform all of its broadcasting station licensees of the availability of said works for broadcasting.

EIGHTH: Publisher represents and warrants that:

(a) Schedule A hereto annexed is a complete list of all titles of all works which are owned or controlled by Publisher as of the date of this agreement and shows thereon the information required under subdivision (a) of paragraph "SIXTH" hereof;

(b) All rights granted by Publisher, under the terms of this agreement, are Publisher's sole and exclusive property; that said rights are free from all encumbrances and claims; and that Publisher has full right and power to make the within agreement; and that there exists no adverse claim to or in the said rights and that no foreign or domestic performing rights licensing society or other organization has any performing, broadcasting or television rights in the works; and Publisher agrees to defend, indemnify, save and hold BMI, its licensees, the advertisers of its licensees, and their respective agents, servants and employees, free and harmless from any and all claims, demands, suits, judgments and recoveries, including lawyers' fees, which may be made or brought against them or any of them arising out of the grant of rights herein or arising out of the performance of any work or works embraced by this agreement, provided, however, that the obligations of Publisher to indemnify, all as provided in this paragraph, shall not apply to any matter added to, or changes made in, any work by BMI or its licensees;

(c) Publisher has obtained, with respect to all works owned or controlled by it as of the date of this agreement, and will obtain, with respect to works acquired during the term, written agreements signed by all of the authors and composers of the works granting to Publisher the rights transferred by this agreement.

NINTH: Upon the service on any of the parties herein indemnified of any notice, demand, process, papers, writ or pleading upon which any such claim, demand, suit or proceeding is made or begun against them or any of them which Publisher shall be obliged to defend hereunder, BMI shall, as soon as may be practicable, give Publisher notice thereof and shall deliver to Publisher such papers or true copies thereof, and BMI shall have the right to participate in such suits by counsel of its own selection, at its own expense. Publisher agrees to cooperate with BMI in all such matters.

TENTH: BMI represents that it now has in excess of six hundred (600) broadcasting station licensees, and agrees that in the event the number of its licensees should be reduced to less than three hundred (300) at any time during the term, Publisher shall have the right to terminate this agreement at any time thereafter during the existence of such condition by giving BMI ninety (90) days' notice in writing.

ELEVENTH: In the event that Governmental Rules and Regulations, affecting a substantial number of BMI's commercial broadcasting station licensees or a substantial volume of the business of BMI's commercial broadcasting station licensees, are changed so as to forbid or restrict substantially the broadcasting of commercial programs, BMI shall have the right to terminate this agreement at any time thereafter, during the existence of either of such conditions, by giving Publisher thirty (30) days' notice in writing, provided that BMI shall, prior to the end of said thirty-day period, also terminate all agreements of a similar nature with other publishers containing a similar right of termination. In the event of such termination BMI shall be under no further liability to Publisher for payments hereunder, except that payments shall be made for all periods up to the effective date of such termination, and Publisher shall remain liable under the indemnity provisions of this agreement with respect to all performances made prior to the termination date.

TWELFTH: Publisher hereby makes, constitutes and appoints BMI, or its nominee, Publisher's true and lawful attorney, irrevocably during the term hereof, and in the name of BMI or its nominee, or in the name of Publisher, or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process or pleadings that may be necessary, proper or expedient to restrain infringements and to enforce and protect the rights conveyed by this agreement, and to recover damages in respect to or for the infringement or other violation of the said performing, broadcasting and television rights in the works, and in its sole judgment, to join Publisher and/or others in whose names the copyrights to any works may stand, to discontinue, compromise or refer to arbitration, any such actions or proceedings, or to make any other disposition of the differences in relation to the premises, provided, however, that any moneys received by BMI by way of damages or otherwise from any infringement or violation of the aforesaid right shall be the sole and exclusive property of BMI.

Any actions or proceedings commenced by BMI pursuant to the provisions of this paragraph "TWELFTH" shall be at BMI's sole expense.

THIRTEENTH: In the event that Publisher shall at any time during the term hereof engage in the business of soliciting lyrics or musical compositions for a fee or shall accept manuscripts from composers in consideration of any payments to be made by such composers either for arranging, promotion, recording (whether by Publisher directly or by a recording company owned, operated or controlled by Publisher or by any owner or employee of Publisher), or for any other services, then BMI shall have the right in its sole discretion to terminate this agreement upon thirty (30) days' written notice to Publisher.

FOURTEENTH: In the event of any dispute of any kind, nature or description whatsoever arising between BMI and Publisher in connection with the terms and conditions of this agreement, or arising out of the performance hereof, or based upon an alleged breach hereof, the same shall be submitted to arbitration in New York City by a board consisting of three arbitrators under the then prevailing rules of the American Arbitration Association pursuant to the New York arbitration law. Each of the parties hereto shall have the right to select one of the said three arbitrators and the two arbitrators so selected shall thereupon select the third arbitrator, provided, however, that in the event the said two arbitrators shall be unable to agree upon the selection of a third arbitrator, such third arbitrator shall be appointed by the American Arbitration Association, and the parties further agree to abide by and perform any award with respect to any such controversy rendered by the Arbitration in conformity with this agreement, and that the expenses of such arbitration shall be divided equally between the parties.

FIFTEENTH: This agreement and each of the provisions thereof shall bind and inure to the benefit of each of the parties hereto and their respective successors. This agreement shall be construed in accordance with the laws of the State of New York. This agreement shall not be assignable by either party without the consent of the other.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed as of the day and year first above written.

BROADCAST MUSIC, INC.

By _____
Vice President

_____

By _____
(Sign here)

SCHEDULE A

TITLE	WRITER(S)	COPYRIGHT DATE	E 541

E 542

Gentlemen:

Our contract dated is hereby modified so that the grant of performing rights and of the other rights enumerated in Paragraph SECOND shall be effective for the entire world, and the territory covered by the said contract shall be the entire world.

It is understood that BMI will notify you promptly when BMI consummates contracts conveying your said rights for any country or countries not included in our present contract prior to this modification, and that all revenue BMI receives therefrom which is allocable to publishers will be divided either in accordance with the accountings that BMI receives from abroad, or, in the absence of such accountings, in the proportion which your logged performances in the United States shall bear to the logged performances in the United States of the other publishers who shall have conveyed these foreign rights to BMI. It is further understood that BMI shall have the right to deduct ten per cent (10%) of all monies received by BMI from performing rights societies outside the United States, its territories and possessions and Canada and to retain the sums so deducted to cover BMI's handling and administrative expenses.

You shall be free to convey performance rights for the country of foreign publication to any publisher who may publish any one or more of your works abroad in any of the countries added to our contract by this modification until such date as contracts are actually made by BMI for the licensing of such works in such country, but you shall not be free, of course, to make such grant for any country with respect to which BMI shall have made any such contract and notified you thereof.

Your signature beneath the words "ACCEPTED AND AGREED TO" will constitute this a binding modification of the aforesaid contract between us, such contract being in all other respects specifically ratified and affirmed.

Very truly yours,

BROADCAST MUSIC, INC.

ACCEPTED AND AGREED TO:

By_____

By_____
(Sign Here)

Rev. 2/66

CBS v. ASCAP

Plaintiffs' Exhibit No. 443

Two forms of BMI publisher affiliation agreement used from March 1969 to August 1970 (furnished by BMI as Exhibit 2 in connection with BMI Answer, dated 3/26/71, to CBS Interrogatory No. 9).

E 544

3/69-8/70

BMI

AGREEMENT made this day of , 19 , between BROADCAST MUSIC, INC., a New York corporation, whose address is 589 Fifth Avenue, New York, N. Y. 10017 (hereinafter called "BMI") and

a corporation doing business under the firm name and style of whose address is

(Street or Avenue) (City) (State) (Zip)

(hereinafter called "Publisher").

WITNESSETH:

FIRST: The term of this agreement shall be the period of five (5) years from to , and continuing thereafter for additional periods of five (5) years each unless terminated by either party at the end of such initial period or any such additional five (5) year period, upon at least three (3) months' notice by registered or certified mail.

SECOND: As used in this agreement, the word "works" shall mean:

A. All musical and dramatico-musical compositions, whether published or unpublished, now owned or copyrighted by Publisher or in which Publisher owns or controls performing rights, including but not limited to the compositions listed in Schedule A hereof, and

B. All musical and dramatico-musical compositions, whether published or unpublished, in which hereafter during the term Publisher acquires ownership or copyright or ownership or control of the performing rights, from and after the date of the acquisition by Publisher of such ownership or control.

THIRD: Publisher hereby sells, assigns and transfers to BMI, its successors or assigns, for the term of this agreement:

A. All the rights which Publisher owns or acquires publicly to perform, and to license others to perform, for profit or otherwise, anywhere in the world, any part or all of the works, such rights being granted exclusively to BMI except to the extent specifically set forth on Schedule A or on a clearance sheet or cue sheet submitted pursuant to subparagraph A of paragraph TENTH.

B. The non-exclusive right to record, and to license others to record, any part or all of any of the works on electrical transcriptions, wire, tape, film or otherwise, but only for the purpose of performing such work publicly by means of radio and television or for archive or audition purposes and not for sale to the public or for synchronization with motion pictures intended primarily for theatrical exhibition or with programs distributed by means of syndication to broadcasting stations.

C. The non-exclusive right to adapt, arrange, change and dramatize any part or all of any of the works for performance purposes, and to license others to do so.

FOURTH:

A. The rights granted to BMI by subparagraph A of paragraph THIRD hereof shall not include the right to perform or license the performance of more than one song or aria from an opera, operetta or musical comedy or more than five (5) minutes from a ballet if such performance is accompanied by the dramatic action, costumes or scenery of that opera, operetta, musical comedy or ballet.

B. Publisher, together with all the writers and co-publishers, if any, of a work, shall have the right jointly, by written notice to BMI, to exclude from the grant made by subparagraph A of paragraph THIRD hereof performances of more than thirty (30) minutes' duration of a work which is an opera, operetta or musical comedy, but this right shall not apply to a work which is the score of a film originally produced for exhibition in motion picture theaters when performed as incorporated in such film, or which is a score originally written for a radio or television program when performed as incorporated in such program.

FIFTH: As full consideration for all rights granted to BMI hereunder, BMI agrees to make payments to Publisher as follows:

A. With respect to each of the works in which BMI has exclusive performing rights:

(1) For performances of works on broadcasting stations in the United States, its territories and possessions and Canada BMI will pay amounts calculated pursuant to BMI's then standard practices upon the basis of the then current performance rates generally paid by BMI to its affiliated publishers for similar performances of similar compositions. The number of performances for which Publisher shall be entitled to payment shall be estimated by BMI in accordance with its then current system of computing the number of such performances.

(2) For performances of works outside of the United States, its territories and possessions and Canada BMI will pay to Publisher all monies received by BMI in the United States from any performing rights licensing organization which are designated by such organization as the publisher's share of foreign performance royalties earned by any of the works after deduction of ten percent (10%) of the gross amount thereof to cover BMI's handling charge.

(3) In the case of works which, or rights in which, are owned by Publisher jointly with one or more other publishers who have granted performing rights therein to BMI, the sum payable to Publisher under this subparagraph A shall be a pro rata share determined on the basis of the number of publishers, unless BMI shall have received from Publisher a copy of an agreement or other document signed by all of the publishers, providing for a different division of payment.

B. With respect to each of the works licensed by BMI in which its performing rights are non-exclusive:

(1) The sum payable to Publisher (together with other publishers, if any, who have granted performing rights therein to BMI) shall be one-half of the sum payable for performances of works under subparagraph A of this paragraph FIFTH.

(2) BMI shall have the right, at any time, upon at least sixty (60) days' written notice to Publisher to exclude such work from this agreement.

C. Notwithstanding the foregoing provisions of this paragraph FIFTH, BMI shall have no obligation to make payment hereunder with respect to any performance of a work which occurs prior to the date on which BMI shall have received from Publisher all of the material with respect to such work referred to in subparagraphs A and B(1) of paragraph TENTH hereof and in the case of live performances, the information referred to in subparagraph B of paragraph TENTH hereof.

SIXTH: BMI will furnish statements to Publisher at least twice during each year of the term showing the number of performances of the works as computed pursuant to subparagraph A(1) of paragraph FIFTH hereof, and at least once during each year of the term showing the monies received by BMI referred to in subparagraph A(2) of paragraph FIFTH hereof. Each such statement shall be accompanied by payment of the sum thereby shown to be due to Publisher, subject to all proper deductions, if any, for advances or amounts due to BMI from Publisher.

SEVENTH:

A. Notwithstanding the termination of this agreement, BMI shall continue to make payments to Publisher with respect to performances of any of the works in which BMI continues to license performing rights for so long as Publisher makes no other grant of performing rights therein to any other licensing organization; nothing in this agreement shall, however, require BMI to continue licensing any such work. The amounts of such payments shall be calculated pursuant to BMI's then current standard practices upon the basis of the then current performance rates generally paid by BMI to its affiliated publishers for similar performances of similar compositions.

B. BMI's obligation to continue payment to Publisher after the termination of this agreement for performances outside of the United States, its territories and possessions and Canada shall be dependent upon BMI's receipt in the United States of payments designated by foreign performing rights licensing organizations as the publisher's share of foreign performance royalties earned by any of the works. Payment of such foreign royalties shall be subject to deduction of BMI's then current handling charge applicable to its affiliated publishers.

EIGHTH: In the event that this agreement shall terminate at a time when, after crediting all earnings reflected by the statements rendered to Publisher prior to the effective date of such termination, there is an indebtedness from Publisher to BMI, for advances or otherwise, such termination shall not be effective with respect to the works then embraced by this agreement until thirty (30) days after such indebtedness shall be paid by Publisher or until a statement is rendered by BMI at its normal accounting period showing that the amount of such indebtedness has been fully recouped by BMI.

NINTH:

A. BMI shall have the right, upon written notice to Publisher, to exclude from this agreement, at any time, any work which in its opinion (1) is similar to a previously existing composition and might constitute a copyright infringement, or (2) has a title or music or lyric similar to that of a previously existing composition and might lead to a claim of unfair competition, or (3) is offensive, in bad taste or against public morals, or (4) is not reasonably suitable for performance.

B. In the case of works which in the opinion of BMI are based on compositions in the public domain, BMI shall have the right, at any time, upon written notice to Publisher, either (1) to exclude any such work from this agreement, or (2) to classify any such work as entitled to receive only a stated fraction of the full credit that would otherwise be given for performances thereof.

C. In the event that any work is excluded from this agreement pursuant to subparagraph A or B of this paragraph NINTH, or pursuant to subparagraph C of paragraph TWELFTH hereof, all rights of BMI in such work shall automatically revert to Publisher ten (10) days after the date of the notice of such exclusion given by BMI to Publisher. In the event that a work is classified for less than full credit under subparagraph B(2) of this paragraph NINTH, Publisher shall have the right, by giving notice to BMI within ten (10) days after the date of BMI's notice to Publisher of the credit allocated to such work, to terminate all rights in such work granted to BMI herein and all such rights of BMI in such work shall revert to Publisher thirty (30) days after the date of such notice from Publisher to BMI.

TENTH:

A. With respect to each of the works which has been or shall be published or recorded commercially or synchronized with motion picture or television film or tape or which Publisher considers likely to be performed, Publisher agrees to furnish to BMI:

(1) Two copies of a completed clearance sheet in the form supplied by BMI, unless a cue sheet with respect to such work is furnished pursuant to subparagraph A(3) of this paragraph TENTH.

(2) A legible lead sheet or other written or printed copy of such work setting forth the lyrics, if any, and music correctly metered; provided that with respect to a work used solely as background music, such copy need be furnished only if requested by BMI.

(3) If such work has been or shall be synchronized with or otherwise used in connection with motion picture or television film or tape, a cue sheet showing the title, composers, publisher and nature and duration of the use of the work in such film or tape.

B. Publisher shall submit the material described in subparagraph A of this paragraph TENTH with respect to works heretofore published, recorded or synchronized and not included on Schedule A hereof within ten (10) days after the execution of this agreement and with respect to any of the works hereafter so published, recorded, synchronized or likely to be performed prior to the date of publication or release of the recording, film or tape or anticipated performance.

C. The submission of each clearance sheet or cue sheet shall constitute a warranty by Publisher that all of the information contained thereon is true and correct and that no performing rights in any of the works listed thereon has been granted to or reserved by others except as specifically set forth therein.

D. Publisher agrees:

(1) To submit to BMI, from time to time, so far as known to Publisher, the manufacturers' names, catalog numbers and the names of the recording artists with respect to all phonograph records, tapes, electrical transcriptions and other reproductions made of any of the works.

(2) To secure and maintain copyright protection of the works pursuant to the Copyright Law of the United States and pursuant to the laws of such other nations of the world where such protection is afforded; and to give BMI prompt written notice of the date and number of copyright registration and/or renewal of each work registered in the United States Copyright Office.

(3) To obtain and deliver to BMI any written agreements, assignments, instruments or documents of any kind with respect to any of the works which BMI may reasonably require.

ELEVENTH: Publisher warrants and represents that:

A. Publisher has the right to enter into this agreement; Publisher is not bound by any prior commitments which conflict with its undertakings herein; the rights granted by Publisher to BMI herein are the sole and exclusive property of Publisher and are free from all encumbrances and claims; and exercise of such rights will not constitute infringement of copyright or violation of any right of, or unfair competition with, any person, firm, corporation or association.

B. Except with respect to works in which the possession of performing rights by another person, firm, corporation or association is specifically set forth on Schedule A or on a clearance sheet or cue sheet submitted to BMI pursuant to subparagraph A of paragraph TENTH hereof, Publisher has exclusive performing rights in each of the works by virtue of written grants thereof to Publisher signed by all the authors and composers or other owners of such work.

TWELFTH:

A. Publisher agrees to defend, indemnify, save and hold BMI, its licensees, the advertisers of its licensees and their respective agents, servants and employees, free and harmless from and against any and all demands, loss, damage, suits, judgments, recoveries and costs, including counsel fees, resulting from any claim of whatever nature arising from or in connection with the exercise of any of the rights granted by Publisher in this agreement; provided, however, that the obligations of Publisher under this paragraph TWELFTH shall not apply to any matter added to, or changes made in, any work by BMI or its licensees.

B. Upon the receipt by any of the parties herein indemnified of any notice, demand, process, papers, writ or pleading, by which any such claim, demand, suit or proceeding is made or commenced against them, or any of them, which Publisher shall be obliged to defend hereunder, BMI shall, as soon as may be practicable, give Publisher notice thereof and deliver to Publisher such papers or true copies thereof, and BMI shall have the right to participate by counsel of its own choice, at its own expense. Publisher agrees to cooperate with BMI in all such matters.

C. In the event of such notification of claim or service of process on any of the parties herein indemnified, BMI shall have the right, from the date thereof, to exclude the work with respect to which a claim is made from this agreement and/or to withhold payment of all sums which may become due pursuant to this agreement or any modification thereof until such claim has been withdrawn, settled or adjudicated.

THIRTEENTH: Publisher makes, constitutes and appoints BMI, or its nominee, Publisher's true and lawful attorney, irrevocably during the term hereof, in the name of BMI or that of its nominee, or in Publisher's name, or otherwise, to do all acts, take all proceedings, and execute, acknowledge and deliver any and all instruments, papers, documents, process or pleadings that may be necessary, proper or expedient to restrain infringement of and/or to enforce and protect the rights granted by Publisher hereunder, and to recover damages in respect of or for the infringement or other violation of the said rights, and in BMI's sole judgment to join Publisher and/or others in whose names the copyrights to any of the works may stand, and to discontinue, compromise or refer to arbitration, any such actions or proceedings or to make any other disposition of the disputes in relation to the works; provided that any action or proceeding commenced by BMI pursuant to the provisions of this paragraph THIRTEENTH shall be at its sole expense and for its sole benefit.

FOURTEENTH:

A. It is acknowledged that BMI has heretofore entered into, and may during the term of this agreement enter into, contracts with performing rights licensing organizations for the licensing of public performing rights controlled by BMI in territories outside of the United States, its territories and possesions and Canada, (hereinafter called "foreign territories"). Upon Publisher's written request, BMI agrees to permit Publisher to grant performing rights in any or all of the works for any foreign territory for which, at the time such request is received, BMI has not entered into any such contract with a performing rights licensing organization; provided, however, that any such grant of performing rights by Publisher shall terminate at such time as BMI shall have entered into such a contract with a performing rights licensing organization covering such foreign territory and shall have notified Publisher thereof. Nothing herein contained, however, shall be deemed to restrict Publisher from assigning to its foreign publisher or representative the right to collect a part or all of the publishers' performance royalties earned by any or all of the works in any foreign territory as part of an agreement for the publication, exploitation or representation of such works in such territory, whether or not BMI has entered into such a contract with a performing rights licensing organization covering such territory.

B. Publisher agrees to notify BMI promptly in writing in each instance when publication, exploitation or other rights in any or all of the works are granted for any foreign territory. Such notice shall set forth the title of the work, the country or countries involved, the period of such grant, the name of the person, firm, corporation or association entitled to collect performance royalties earned in the foreign territory and the amount of such share. Within ten (10) days after the execution of this agreement Publisher agrees to submit to BMI, in writing, a list of all works as to which Publisher has, prior to the effective date of this agreement, granted to any person, firm, corporation or association performing rights and/or the right to collect publisher performance royalties earned in any foreign territory.

C. In the event that BMI transmits to Publisher performance royalties designated as the writer's share of performance royalties earned by any of the works in any foreign territory, Publisher shall promptly pay such royalties to the writer or writers of the works involved. If Publisher is unable for any reason to locate and make payment to any of the writers involved within six (6) months from the date of receipt, the amounts due such writers shall be returned to BMI.

FIFTEENTH:

A. Publisher agrees that Publisher, its agents, employees, representatives or affiliated companies, will not directly or indirectly during the term of this agreement:

(1) Solicit or accept payment from or on behalf of authors for composing music for lyrics, or from or on behalf of composers for writing lyrics to music.

(2) Solicit or accept manuscripts from composers or authors in consideration of any payments to be made by or on behalf of such composers or authors for reviewing, arranging, promotion, publication, recording or any other services connected with the exploitation of any composition.

(3) Permit Publisher's name, or the fact of its affiliation with BMI, to be used by any other person, firm, corporation or association engaged in any of the practices described in subparagraphs A(1) and A(2) of this paragraph FIFTEENTH.

(4) Submit to BMI, as one of the works to come within this agreement, any musical composition with respect to which any payments described in subparagraphs A(1) and A(2) of this paragraph FIFTEENTH have been made by or on behalf of a composer or author to any person, firm, corporation or associatica.

B. Publisher agrees that Publisher, its agents, employees or representatives will not directly or indirectly during the term of this agreement make any effort to ascertain from, or offer any inducement or consideration to, anyone, including but not limited to any broadcasting licensee of BMI or to the agents, employers or representatives of BMI or of any such licensee, for information regarding the time or times when any such BMI licensee is to report its performances to BMI, or to attempt in any way to manipulate performances or affect the representative character or accuracy of BMI's system of sampling or logging performances.

C. Publisher agrees to notify BMI promptly in writing (1) of any change of firm name or address of Publisher, and (2) of any change of twenty percent (20%) or more in the ownership thereof.

D. In the event of the violation of any of the provisions of subparagraphs A, B or C of this paragraph FIFTEENTH, BMI shall have the right, in its sole discretion, to terminate this agreement by giving Publisher at least thirty (30) days' notice by registered or certified mail. In the event of such termination, no payments shall be due to Publisher pursuant to paragraph SEVENTH hereof.

SIXTEENTH: All disputes of any kind, nature or description whatsoever arising in connection with the terms and conditions of this agreement, or arising out of the performance thereof, or based upon an alleged breach thereof, shall be submitted to arbitration in the City, County and State of New York under the then prevailing rules of the American Arbitration Association by an arbitrator or arbitrators to be selected as follows: Each of the parties hereto shall by written notice to the other have the right to appoint one arbitrator; provided, however, that if within

ten (10) days following the giving of such notice by one party the other [illegible] by written notice appoint another arbitrator the first arbitrator appointed shall be the sole arbitrator. If two [illegible]trators are so appointed, they shall thereupon appoint the third arbitrator, provided that if ten (10) days shall elapse after the appointment of the second arbitrator and the said two arbitrators are unable to agree upon the appointment of the third arbitrator then either party may in writing request the American Arbitration Association to appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on the parties hereto and judgment may be, but need not be, entered thereon in any court having jurisdiction. Such award shall include the fixing of the cost of arbitration, which shall be borne by the unsuccessful party.

SEVENTEENTH: Publisher agrees that it shall not, without the written consent of BMI, assign any of its rights hereunder. No rights of any kind against BMI will be acquired by the assignee if any such purported assignment is made by Publisher without such written consent.

EIGHTEENTH: Any notice sent to Publisher pursuant to the terms of this agreement shall be valid if addressed to Publisher at the last address furnished by Publisher in writing to BMI's Department of Publisher Administration.

NINETEENTH: This agreement cannot be changed orally and shall be governed and construed pursuant to the laws of the State of New York.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed as of the day and year first above written.

BROADCAST MUSIC, INC.

By .....

.....

By .....

(Sign here)

SCHEDULE A

TITLE	WRITER(S)	CO-PUBLISHER (if any) COMPANY	PCTGE.	ANY OTHER GRANT OF PERFORMING RIGHTS

BMI

ε 548

AGREEMENT made this day of , 19 , between **BROADCAST MUSIC, INC.**, a New York corporation, whose address is 589 Fifth Avenue, New York, N. Y. 10017 (hereinafter called "BMI") and

a corporation doing business under the firm name and style of whose address is

(Street or Avenue) (City) (State) (Zip)

(hereinafter called "Publisher"),

WITNESSETH:

FIRST: The term of this agreement shall be the period of five (5) years from to , and continuing thereafter for additional periods of five (5) years each unless terminated by either party at the end of such initial period or any such additional five (5) year period, upon at least three (3) months' notice by registered or certified mail.

SECOND: As used in this agreement, the word "works" shall mean:

A. All musical and dramatico-musical compositions, whether published or unpublished, now owned or copyrighted by Publisher or in which Publisher owns or controls performing rights, including but not limited to the compositions listed in Schedule A hereof, and

B. All musical and dramatico-musical compositions, whether published or unpublished, in which hereafter during the term Publisher acquires ownership or copyright or ownership or control of the performing rights, from and after the date of the acquisition by Publisher of such ownership or control.

THIRD: Publisher hereby sells, assigns and transfers to BMI, its successors or assigns, for the term of this agreement:

A. All the rights which Publisher owns or acquires publicly to perform, and to license others to perform, for profit or otherwise, anywhere in the world, any part or all of the works, such rights being granted exclusively to BMI except to the extent specifically set forth on Schedule A or on a clearance sheet or cue sheet submitted pursuant to subparagraph A of paragraph TENTH.

B. The non-exclusive right to record, and to license others to record, any part or all of any of the works on electrical transcriptions, wire, tape, film or otherwise, but only for the purpose of performing such work publicly by means of radio and television or for archive or audition purposes and not for sale to the public or for synchronization with motion pictures intended primarily for theatrical exhibition or with programs distributed by means of syndication to broadcasting stations.

C. The non-exclusive right to adapt, arrange, change and dramatize any part or all of any of the works for performance purposes, and to license others to do so.

FOURTH:

A. The rights granted to BMI by subparagraph A of paragraph THIRD hereof shall not include the right to perform or license the performance of more than one song or aria from an opera, operetta or musical comedy or more than five (5) minutes from a ballet if such performance is accompanied by the dramatic action, costumes or scenery of that opera, operetta, musical comedy or ballet.

B. Publisher, together with all the writers and co-publishers, if any, of a work, shall have the right jointly, by written notice to BMI, to exclude from the grant made by subparagraph A of paragraph THIRD hereof performances of more than thirty (30) minutes' duration of a work which is an opera, operetta or musical comedy, but this right shall not apply to a work which is the score of a film originally produced for exhibition in motion picture theaters when performed as incorporated in such film, or which is a score originally written for a radio or television program when performed as incorporated in such program.

FIFTH: As full consideration for all rights granted to BMI hereunder, BMI agrees to make payments to Publisher as follows:

A. With respect to each of the works in which BMI has exclusive performing rights:

(1) For performances of works on broadcasting stations in the United States, its territories and possessions and Canada BMI will pay amounts calculated pursuant to BMI's then standard practices upon the basis of the then current performance rates generally paid by BMI to its affiliated publishers for similar performances of similar compositions. The number of performances for which Publisher shall be entitled to payment shall be estimated by BMI in accordance with its then current system of computing the number of such performances.

(2) For performances of works outside of the United States, its territories and possessions and Canada BMI will pay to Publisher all monies received by BMI in the United States from any performance rights licensing organization which are designated by such organization as the publisher's share of foreign performance royalties earned by any of the works after deduction of ten percent (10%) of the gross amount thereof to cover BMI's handling charge.

(3) In the case of works in which performance rights are owned by Publisher jointly with one or more other publishers who have granted performance rights to BMI, the sum payable to Publisher under this subparagraph A shall be a percentage (not exceeding the lesser of the number of publishers, unless BMI shall have received from Publisher a copy of an agreement or other document signed by all of the publishers, providing for a different division of payment.

B. With respect to each of the works licensed by BMI in which its performing rights are non-exclusive:

(1) The sum payable to Publisher (together with other publishers, if any, who have granted performance rights therein to BMI) shall be one-half of the sum payable for performances of works under subparagraph A of this paragraph FIFTH.

(2) BMI shall have the right, at any time, upon at least sixty (60) days' written notice to Publisher to exclude such work from this agreement.

C. Notwithstanding the foregoing provisions of this paragraph FIFTH, BMI shall have no obligation to make payment hereunder with respect to any performance of a work which occurs prior to the date on which BMI shall have received from Publisher a cue sheet with respect to such work referred to in subparagraphs A and B (1) of paragraph SEVENTH hereof, and in the case of bona fide performances, the information referred to in subparagraph B of paragraph FOURTEENTH hereof.

SIXTH: BMI will furnish statements to Publisher at least twice during each year of the term showing the number of performances of the works as computed pursuant to subparagraph A(1) of paragraph FIFTH hereof, and at least once during each year of the term showing the monies received by BMI referred to in subparagraph A(2) of paragraph FIFTH hereof. Each such statement shall be accompanied by payment of the sum thereby shown to be due to Publisher, subject to all proper deductions, if any, for advances or amounts due to BMI from Publisher.

SEVENTH:

A. Notwithstanding the termination of this agreement, BMI shall continue to make payments to Publisher with respect to performances of any of the works in which BMI continues to license performing rights for so long as Publisher makes no other grant of performing rights therein to any other licensing organization; nothing in this agreement shall, however, require BMI to continue licensing any such work. The amounts of such payments shall be calculated pursuant to BMI's then current standard practices upon the basis of the then current performance rates generally paid by BMI to its affiliated publishers for similar performances of similar compositions.

B. BMI's obligation to continue payment to Publisher after the termination of this agreement for performances outside of the United States, its territories and possessions and Canada shall be dependent upon BMI's receipt in the United States of payments designated by foreign performing rights licensing organizations as the publisher's share of foreign performance royalties earned by any of the works. Payment of such foreign royalties shall be subject to deduction of BMI's then current handling charge applicable to its affiliated publishers.

EIGHTH: In the event that this agreement shall terminate at a time when, after crediting all earnings reflected by the statements rendered to Publisher prior to the effective date of such termination, there is an indebtedness from Publisher to BMI, for advances or otherwise, such termination shall not be effective with respect to the works then embraced by this agreement until thirty (30) days after such indebtedness shall be paid by Publisher or until a statement is rendered by BMI at its normal accounting period showing that the amount of such indebtedness has been fully recouped by BMI.

NINTH:

A. BMI shall have the right, upon written notice to Publisher, to exclude from this agreement, at any time, any work which in its opinion (1) is similar to a previously existing composition and might constitute a copyright infringement, or (2) has a title or music or lyric similar to that of a previously existing composition and might lead to a claim of unfair competition, or (3) is offensive, in bad taste or against public morals, or (4) is not reasonably suitable for performance.

B. In the case of works which in the opinion of BMI are based on compositions in the public domain, BMI shall have the right, at any time, upon written notice to Publisher, either (1) to exclude any such work from this agreement, or (2) to classify any such work as entitled to receive only a stated fraction of the full credit that would otherwise be given for performances thereof.

C. In the event that any work is excluded from this agreement pursuant to subparagraph A or B of this paragraph NINTH, or pursuant to subparagraph C of paragraph TWELFTH hereof, all rights of BMI in such work shall automatically revert to Publisher ten (10) days after the date of the notice of such exclusion given by BMI to Publisher. In the event that a work is classified for less than full credit under subparagraph B(2) of this paragraph NINTH, Publisher shall have the right, by giving notice to BMI within ten (10) days after the date of BMI's notice to Publisher of the credit allocated to such work, to terminate all rights in such work granted to BMI herein and all such rights of BMI in such work shall revert to Publisher thirty (30) days after the date of such notice from Publisher to BMI.

TENTH:

A. With respect to each of the works which has been or shall be published or recorded commercially or synchronized with motion picture or television film or tape or which Publisher considers likely to be performed, Publisher agrees to furnish to BMI:

(1) Two copies of a completed clearance sheet in the form supplied by BMI, unless a cue sheet with respect to such work is furnished pursuant to subparagraph A(3) of this paragraph TENTH.

(2) A legible lead sheet or other written or printed copy of such work setting forth the lyrics, if any, and music correctly metered; provided that with respect to a work used solely as background music, such copy need be furnished only if requested by BMI.

(3) If such work has been or shall be synchronized with or otherwise used in connection with motion picture or television film or tape, a cue sheet showing the title, composers, publisher and nature and duration of the use of the work in such film or tape.

B. Publisher shall submit the material described in subparagraph A of this paragraph TENTH with respect to works heretofore published, recorded or synchronized and not included on Schedule A hereof within ten (10) days after the execution of this agreement and with respect to any of the works hereafter so published, recorded, synchronized or likely to be performed prior to the date of publication or release of the recording, film or tape or anticipated performance.

C. The submission of each clearance sheet or cue sheet shall constitute a warranty by Publisher that all of the information contained thereon is true and correct and that no performing rights in any of the works listed thereon has been granted to or reserved by others except as specifically set forth therein.

D. Publisher agrees:

(1) To submit to BMI, from time to time, so far as known to Publisher, the manufacturers' names, catalog numbers and the names of the recording artists with respect to all phonograph records, tapes, electrical transcriptions and other reproductions made of any of the works.

(2) To secure and maintain copyright protection of the works pursuant to the Copyright Law of the United States and pursuant to the laws of such other nations of the world where such protection is afforded; and to give BMI prompt written notice of the date and number of copyright registration and/or renewal of each work registered in the United States Copyright Office.

(3) To obtain and deliver to BMI any written agreements, assignments, instruments or documents of any kind with respect to any of the works which BMI may reasonably require.

ELEVENTH: Publisher warrants and represents that:

A. Publisher has the right to enter into this agreement; Publisher is not bound by any prior commitments which conflict with its undertakings hereunder; the rights granted by Publisher to BMI herein are free and exclusive property of Publisher and are free from all encumbrances and claims; and exercise of such rights will not constitute infringement of copyright or violation of any right of, or unfair competition with, any person, firm, corporation or association.

B. Except with respect to works in which the possession of performing rights by another person, firm, corporation or association is specifically set forth on Schedule A of an clearance sheet or cue sheet submitted to BMI pursuant to subparagraph A of paragraph TENTH hereof, Publisher has exclusive performance rights in each of the works by virtue of written grants thereof to Publisher signed by all the authors and composers or other owners of such work.

TWELFTH:

A. Publisher agrees to defend, indemnify, save and hold BMI, its licensees, the advertisers of its licensees and their respective agents, servants and employees, free and harmless from and against any and all demands, loss, damage, suits, judgments, recoveries and costs, including counsel fees, resulting from any claim of whatever nature arising from or in connection with the exercise of any of the rights granted by Publisher in this agreement; provided, however, that the obligations of Publisher under this paragraph TWELFTH shall not apply to any matter added to, or changes made in, any work by BMI or its licensees.

B. Upon the receipt by any of the parties herein indemnified of any notice, demand, process, papers, writ or pleading, by which any such claim, demand, suit or proceeding is made or commenced against them, or any of them, which Publisher shall be obligated to defend hereunder, BMI shall, as soon as may be practicable give Publisher notice thereof and deliver to Publisher such papers or true copies thereof, and BMI shall have the right to participate by counsel of its own choice, at its own expense. Publisher agrees to cooperate with BMI in all such matters.

C. In the event of such notification of claim or service of process on any of the parties herein indemnified, BMI shall have the right, from the date thereof, to exclude the work with respect to which a claim is made from this agreement and/or to withhold payment of all sums which may become due pursuant to this agreement or any modification thereof until such claim has been withdrawn, settled or adjudicated.

THIRTEENTH: Publisher makes, constitutes and appoints BMI, or its nominee, Publisher's true and lawful attorney, irrevocable during the term hereof, in the name of BMI or that of its nominee, or in Publisher's name, or otherwise, to do all acts, take all proceedings, and execute, acknowledge and deliver any and all instruments, papers, documents, process or pleadings that may be necessary, proper or expedient to restrain infringement of and/or to enforce and protect the rights granted to Publisher hereunder, and to recover damages in respect of or for the infringement or other violation of the said rights, and in BMI's sole judgment to join Publisher and/or others in whose names the copyrights to any of the works may stand, and to discontinue, compromise or refer to arbitration, any such actions or proceedings or to make any other disposition of the disputes in relation to the works; provided that any action or proceeding commenced by BMI pursuant to the provisions of this paragraph THIRTEENTH shall be at its sole expense and for its sole benefit.

FOURTEENTH:

A. It is acknowledged that BMI has heretofore entered into, and may during the term of this agreement enter into, contracts with performing rights licensing organizations for the licensing of public performing rights controlled by BMI in territories outside of the United States, its territories and possessions and Canada, (hereinafter called "foreign territories"). Upon Publisher's written request, BMI agrees to permit Publisher to grant performing rights in any or all of the works for any foreign territory for which, at the time such request is received, BMI has not entered into any such contract with a performing rights licensing organization; provided, however, that any such grant of performing rights by Publisher shall terminate at such time when BMI shall have entered into such a contract with a performing rights licensing organization covering such foreign territory and shall have notified Publisher thereof. Nothing herein contained, however, shall be deemed to restrict Publisher from assigning to its foreign publisher or representative the right to collect a part or all of the publishers' performance royalties earned by any or all of the works in any foreign territory as part of an agreement for the publication, exploitation or representation of such works in such territory, whether or not BMI has entered into such a contract with a performing rights licensing organization covering such territory.

B. Publisher agrees to notify BMI promptly in writing in each instance when publication, exploitation or other rights in any or all of the works are granted for any foreign territory. Such notice shall set forth the title of the work, the country or countries involved, the period of such grant, the name of the person, firm, corporation or association entitled to collect performance royalties earned in the foreign territory and the amount of such share. Within ten (10) days after the execution of this agreement Publisher agrees to submit to BMI, in writing, a list of all works as to which Publisher has, prior to the effective date of this agreement, granted to any person, firm, corporation or association performing rights and/or the right to collect publisher performance royalties earned in any foreign territory.

C. In the event that BMI transmits to Publisher performance royalties designated as the writer's share of performance royalties earned by any of the works in any foreign territory, Publisher shall promptly pay such royalties to the writer or writers of the works involved. If Publisher is unable for any reason to locate and make payment to any of the writers involved within six (6) months from the date of receipt, the amounts due such writers shall be returned to BMI.

FIFTEENTH:

A. Publisher agrees that Publisher, its agents, employees, representatives or affiliated companies, will not directly or indirectly during the term of this agreement:

(1) Solicit or accept payment from or on behalf of authors for composing music for lyrics, or from or on behalf of composers for writing lyrics to music.

(2) Solicit or accept manuscripts from composers or authors in consideration of any payments to be made by or on behalf of such composers or authors for reviewing, arranging, promotion, publication, recording or any other services connected with the exploitation of any composition.

(3) Permit Publisher's name, or the fact of its affiliation with BMI, to be used by any other person, firm, corporation or association engaged in any of the practices described in subparagraphs A(1) and A(2) of this paragraph FIFTEENTH.

(4) Submit to BMI as one of the works to be covered by this agreement, any musical composition with respect to which any payments described in subparagraphs A(1) or A(2) of this paragraph FIFTEENTH have been made by or on behalf of a composer or author to any person, firm, corporation or association.

B. Publisher agrees that Publisher, its agents, employees or representatives will not directly or indirectly during the term of this agreement make any effort to ascertain from, or offer any inducement or consideration to, anyone, including but not limited to any broadcasting licensee of BMI or to the agents, employees or representatives of BMI or of any such licensee, for information regarding the time or times when any such BMI licensee is to report its performances to BMI, or to attempt in any way to manipulate performances or affect the representative character or accuracy of BMI's system of sampling or logging performances.

C. Publisher agrees to notify BMI promptly in writing (1) of any change of firm name or address of Publisher, and (2) of any change of twenty percent (20%) or more in the ownership thereof.

D. In the event of the violation of any of the provisions of subparagraphs A, B or C of this paragraph FIFTEENTH, BMI shall have the right, in its sole discretion, to terminate this agreement by giving Publisher at least thirty (30) days notice by registered or certified mail. In the event of such termination, no payments shall be due to Publisher pursuant to paragraph SEVENTH hereof.

SIXTEENTH: All disputes of any kind, nature or description whatsoever arising in connection with the terms and conditions of this agreement, or arising out of the performance thereof, or based upon an alleged breach thereof, shall be submitted to arbitration in the City, County and State of New York under the then prevailing rules of the American Arbitration Association by an arbitrator or arbitrators to be selected as follows: Each of the parties hereto shall by written notice to the other have the right to appoint one arbitrator; provided, however, that if within

ten (10) days following the giving of such notice by one party the other shall not by written notice appoint another arbitrator the first arbitrator appointed shall be the sole arbitrator. If two arbitrators are so appointed, they shall thereupon appoint the third arbitrator, provided that if ten (10) days shall elapse after the appointment of the second arbitrator and the said two arbitrators are unable to agree upon the appointment of the third arbitrator then either party may in writing request the American Arbitration Association to appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on the parties hereto and judgment may be, but need not be, entered thereon in any court having jurisdiction. Such award shall include the fixing of the cost of arbitration, which shall be borne by the unsuccessful party.

SEVENTEENTH: Publisher agrees that it shall not, without the written consent of BMI, assign any of its rights hereunder. No rights of any kind against BMI will be acquired by the assignee if any such purported assignment is made by Publisher without such written consent.

EIGHTEENTH: Any notice sent to Publisher pursuant to the terms of this agreement shall be valid if addressed to Publisher at the last address furnished by Publisher in writing to BMI's Department of Publisher Administration.

NINETEENTH: This agreement cannot be changed orally and shall be governed and construed pursuant to the laws of the State of New York.

TWENTIETH: This agreement, as of its effective date, cancels and supersedes the agreement between the parties dated _____ and all modifications thereof (herein called the "Superseded Agreement"). All works embraced by the Superseded Agreement shall be deemed included in Schedule A hereof.

It is agreed that any part of any advances heretofore made to Publisher pursuant to the Superseded Agreement which shall not have been recouped by performances of works up to the effective date of this agreement shall be deemed to be an advance against all monies which may become payable to Publisher pursuant to this agreement and any extensions, renewals or modifications thereof, or substitutions therefor, for performances of the works in the United States and Canada.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed as of the day and year first above written.

BROADCAST MUSIC, INC.

By _____

_____

By _____
(Sign here)

SCHEDULE A

TITLE	WRITER(S)	CO-PUBLISHER (if any) COMPANY	PUBLISHER	ANY OTHER GRANT OF PERFORMING RIGHTS

CBS v. ASCAP

Plaintiffs' Exhibit No. 449

Two forms of BMI writer affiliation agreement used from December 1968 to July 1970 (furnished by BMI as Exhibit 8 in connection with BMI Answer, dated 3/26/71, to CBS Interrogatory 9).

E 553 12/68-7/70

BROADCAST MUSIC, INC.

589 Fifth Avenue New York, N. Y. 10017

Date

Dear

The following shall constitute the agreement between us:

1. As used in this agreement:

(a) The word "period" shall mean the term of two years from to , and continuing thereafter for additional terms of two years each unless terminated by either party at the end of said initial term or any additional term, upon at least sixty (60) days' notice by registered or certified mail.

(b) The word "works" shall mean:

(i) All musical and dramatico-musical compositions composed by you alone or with one or more collaborators during the period; and

(ii) All musical and dramatico-musical compositions composed by you alone or with one or more collaborators prior to the period, except those in which there is an outstanding grant of the right of public performance to a person other than a publisher affiliated with BMI.

2. You hereby warrant and represent that Schedule "A" hereto is a complete listing of all the works which have been published in printed copies or commercially recorded or which are being currently performed or which you regard as likely to be performed; that the information contained in said Schedule is true and correct; and that no performing rights in any of said works have been granted to others except as specifically set forth in said Schedule.

3. You agree that in each instance that a work not listed on Schedule "A" is published in printed copies or recorded commercially or in synchronization with film or tape, or is regarded by you as likely to be performed, whether such work is composed prior to the execution of this agreement or hereafter during the period, you will promptly furnish to us a copy of the work together with a supplement to Schedule "A" setting forth the information with respect thereto called for by said Schedule. Such action by you shall constitute a warranty that the information contained in such supplement is true and correct.

4. You hereby grant to us for the period:

(a) All the rights that you own or acquire publicly to perform, and to license others to perform, for profit or otherwise, anywhere in the world, any part or all of the works, such rights being granted exclusively to us except to the extent of any prior grants listed on Schedule "A" hereto.

(b) The non-exclusive right to record, and to license others to record, any part or all of any of the works on electrical transcriptions, wire, tape, film or otherwise, but only for the purpose of performing such work publicly by means of radio and television or for archive or audition purposes and not for sale to the public or for sychronization with motion pictures intended primarily for theatrical exhibition or with programs distributed by means of syndication to broadcasting stations.

(c) The non-exclusive right to adapt, arrange, change and dramatize any part or all of any of the works for performance purposes, and to license others to do so.

5. (a) The rights granted to us by sub-paragraph (a) of paragraph 4 hereof shall not include the right to perform or license the performance of more than one song or aria from an opera, operetta, or musical comedy or more than five minutes from a ballet if such performance is accompanied by the dramatic action, costumes or scenery of that opera, operetta, musical comedy or ballet.

(b) You, together with the publisher and your collaborators, if any, shall have the right jointly, by written notice to us, to exclude from the grant made by sub-paragraph (a) of paragraph 4 hereof performances of more than thirty (30) minutes' duration of a work which is an opera, operetta or musical comedy, but this right shall not apply to a work which is the score of a film originally written for exhibition in motion picture theaters when performed as incorporated in such film, or which is a score originally written for a radio or television program when performed as incorporated in such program.

6. (a) As full consideration for all rights granted to us hereunder, we agree to pay to you, with respect to each of the works in which we obtain and retain exclusive performing rights during the period:

(i) For performances of a work on broadcasting stations in the United States, its territories and possessions and Canada, amounts calculated pursuant to our then current standard practices upon the basis of the then current performance rates generally paid by us to our affiliated writers for similar performances of similar compositions. The number of performances for which you shall be entitled to payment shall be estimated by us in accordance with our then current system of computing the number of such performances.

(ii) All monies received by us from any performing rights licensing organization outside of the United States, its territories and possessions and Canada, which are designated by such performing rights licensing organization as the author's share of foreign performance royalties earned by your works after the deduction of ten percent (10%) of the gross amount thereof to cover our handling charge.

(b) In the case of a work composed by you with one or more collaborators, the sum payable to you hereunder shall be a pro rata share, determined on the basis of the number of collaborators, unless you shall have transmitted to us a copy of an agreement between you and your collaborators, providing for a different division of payment.

(c) We shall have no obligation to make payment hereunder with respect to (i) any performance of a work which occurs prior to the date on which we have received from you all of the information and material with respect to such work which is referred to in paragraph 2 or 3 hereof, or (ii) any performance of a work for which you receive payment of performance royalties from the publisher thereof. You waive the right to receive performance royalties from the publisher of any work with respect to any and all performances thereof for which you receive payment from us hereunder.

7. We will furnish statements to you at least twice during each year of the period showing the number of performances as computed pursuant to sub-paragraph (a) (i) of paragraph 6 hereof and at least once during each year of the period showing the monies due pursuant to sub-paragraph (a) (ii) of paragraph 6 hereof. Each statement shall be accompanied by payment to you, subject to all proper deductions for advances, if any, of the sum thereby shown to be due for such performances.

8. (a) Notwithstanding the termination of this agreement, we shall continue to make payments to you with respect to performances of any of the works in which we have exclusive performing rights for so long as we continue to have such exclusive rights; but nothing in this agreement shall require us to continue licensing any such work. The amounts of such payments shall be calculated pursuant to our then current standard practices upon the basis of the then current performance rates generally paid by us to our affiliated writers for similar performances of similar compositions.

(b) Our obligation to continue payment to you after the termination of this agreement for performances outside of the United States, its territories and possessions and Canada shall be dependent upon our receipt in the United States of payments designated by foreign performing rights organizations as the author's share of foreign performance royalties earned by your works. Payment of such foreign royalties shall be subject to deduction of our then current handling charge applicable to our affiliated writers.

9. In the event that you terminate this agreement pursuant to sub-paragraph (a) of paragraph 1 hereof at a time when, after crediting all earnings reflected by the statements rendered to you prior to the effective date of such termination, there remains an unearned balance of advances made to you by us, such termination shall not be effective with respect to the works then embraced by this agreement unless and until thirty (30) days after the unpaid balance of advances shall be repaid by you or until a statement is rendered by us at our normal accounting period showing that such unearned balance of advances has been fully recouped by us.

10. You warrant and represent that you have the right to enter into this agreement; that you are not bound by any prior commitments which conflict with your commitments hereunder; that each of the works, composed by you alone or with one or more collaborators, is original; and that exercise of the rights granted by you herein will not constitute an infringement of copyright or violation of any other right of, or unfair competition with, any person, firm or corporation. You agree to indemnify and hold harmless us and our licensees from and against any and all loss or damage resulting from any claim of whatever nature arising from or in connection with the exercise of any of the rights granted by you in this agreement. Upon notification to us or any of our licensees of a claim with respect to any of the works, we shall have the right to exclude such work from this agreement and/or to withhold payment of all sums which become due pursuant to this agreement or any modification thereof until such claim has been withdrawn, settled or adjudicated.

11. (a) We shall have the right, upon written notice to you, to exclude from this agreement, at any time, any work which in our opinion (i) is similar to a previously existing composition and might constitute a copyright infringement, or (ii) has a title or music or lyric similar to that of a previously existing composition and might lead to a claim of unfair competition, or (iii) is offensive, in bad taste or against public morals, or (iv) is not reasonably suitable for performance.

(b) In the case of works which in our opinion are based on compositions in the public domain, we shall have the right, upon written notice to you, either (i) to exclude any such work from this agreement, or (ii) to classify any such work as entitled to receive only a fraction of the full credit that would otherwise be given for performances thereof.

(c) In the event that any work is excluded from this agreement pursuant to paragraph 10 or sub-paragraph (a) or (b) of this paragraph 11, all rights in such work shall automatically revert to you ten (10) days after the date of our notice to you of such exclusion. In the event that a work is classified for less than full credit under sub-paragraph (b) (ii) of this paragraph 11, you shall have the right, by giving notice to us, within ten (10) days after the date of our letter advising you of the credit allocated to the work, to terminate our rights therein, and all rights in such work shall thereupon revert to you.

12. In each instance that you write, or are employed or commissioned by a motion picture producer to write, during the period, all or part of the score of a motion picture intended primarily for exhibition in theaters, or by the producer of a dramatico-musical work or revue for the legitimate stage to write, during the period, all or part of the musical compositions contained therein, we agree to advise the producer of the film that such part of the score as is written by you may be performed as part of the exhibition of said film in theaters in the United States, its territories and possessions, without compensation to us, or to the producer of the dramatico-musical work or revue that your compositions embodied therein may be performed on the stage with living artists as part of such dramatico-musical work or revue, without compensation to us. In the event that we notify you that we have established a system for the collection of royalties for performance of the scores of motion picture films in theaters in the United States, its territories and possessions, we shall no longer be obligated to take such action with respect to motion picture scores.

13. You make, constitute and appoint us, or our nominee, your true and lawful attorney, irrevocably during the term hereof, in our name or that of our nominee, or in your name, or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process or pleadings that may be necessary, proper or expedient to restrain infringement of and/or to enforce and protect the rights granted by you hereunder, and to recover damages in respect to or for the infringement or other violation of the said rights, and in our sole judgment to join you and/or others in whose names the copyrights to any of the works may stand: to discontinue, compromise or refer to arbitration, any such actions or proceedings or to make any other disposition of the disputes in relation to the works, provided that any action or proceeding commenced by us pursuant to the provisions of this paragraph shall be at our sole expense and for our sole benefit.

14. You agree that you, your agents, employees or representatives will not, directly or indirectly, solicit or accept payment from writers for composing music for lyrics or writing lyrics to music or for reviewing, publishing, promoting, recording or rendering other services connected with the exploitation of any composition, or permit use of your name or your affiliation with us in connection with any of the foregoing. In the event of a violation of any of the provisions of this paragraph 14, we shall have the right, in our sole discretion, by giving you at least thirty (30) days' notice by registered or certified mail, to terminate this agreement. In the event of such termination no payments shall be due to you pursuant to paragraph 8 hereof.

15. No monies due or to become due to you shall be assignable, whether by way of assignment, sale or power granted to an attorney-in-fact, without our prior written consent. If any assignment of such monies is made by you without such prior written consent, no rights of any kind against us will be acquired by the assignee, purchaser or attorney-in-fact.

16. All disputes of any kind, nature or description whatsoever arising in connection with the terms and conditions of this agreement, or arising out of the performance thereof, or based upon an alleged breach thereof, shall be submitted to arbitration in the City, County and State of New York under the then prevailing rules of the American Arbitration Association by an arbitrator or arbitrators to be selected as follows: Each of us shall by written notice to the other have the right to appoint one arbitrator, provided, however, that if within ten (10) days following the giving of such notice by one of us the other shall not by written notice appoint another arbitrator the first arbitrator appointed shall be the sole arbitrator. If two arbitrators are so appointed, they shall thereupon appoint the third arbitrator, provided that if ten (10) days shall elapse after the appointment of the second arbitrator and the said two arbitrators are unable to agree upon the appointment of the third arbitrator then either of us may, in writing, request the American Arbitration Association to appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on us and judgment may be, but need not be, entered thereon in any court having jurisdiction. Such award shall include the fixing of the cost of arbitration, which shall be borne by the unsuccessful party.

17. Any notice sent to you pursuant to the terms of this agreement shall be valid if addressed to you at the last address furnished by you in writing to our Department of Writer Administration.

18. This agreement cannot be changed orally and shall be governed and construed pursuant to the laws of the State of New York.

Very truly yours,

BROADCAST MUSIC, INC.

By .....

ACCEPTED AND AGREED TO:

.....

E.556

SCHEDULE "A"

TITLE	CO-WRITERS (if any)	YOUR PERCENTAGE OF WRITER CREDIT	PUBLISHER	ANY OTHER GRANT OF PERFORMING RIGHTS BY YOU OR YOUR CO-WRITERS

E 557

BROADCAST MUSIC, INC

589 Fifth Avenue New York, N. Y. 10017

Date

Dear

The following shall constitute the agreement between us:

1. As used in this agreement:

(a) The word "period" shall mean the term from to , and continuing thereafter for additional terms of two years each unless terminated by either party at the end of said initial term or any additional term, upon at least sixty (60) days' notice by registered or certified mail.

(b) The word "works" shall mean:

(i) All musical and dramatico-musical compositions composed by you alone or with one or more collaborators during the period; and

(ii) All musical and dramatico-musical compositions composed by you alone or with one or more collaborators prior to the period, except those in which there is an outstanding grant of the right of public performance to a person other than a publisher affiliated with BMI.

2. You hereby warrant and represent that Schedule "A" hereto is a complete listing of all the works which have been published in printed copies or commercially recorded or which are being currently performed or which you regard as likely to be performed; that the information contained in said Schedule is true and correct; and that no performing rights in any of said works have been granted to others except as specifically set forth in said Schedule.

3. You agree that in each instance that a work not listed on Schedule "A" is published in printed copies or recorded commercially or in synchronization with film or tape, or is regarded by you as likely to be performed, whether such work is composed prior to the execution of this agreement or hereafter during the period, you will promptly furnish to us a copy of the work together with a supplement to Schedule "A" setting forth the information with respect thereto called for by said Schedule. Such action by you shall constitute a warranty that the information contained in such supplement is true and correct.

4. You hereby grant to us for the period:

(a) All the rights that you own or acquire publicly to perform, and to license others to perform, for profit or otherwise, anywhere in the world, any part or all of the works, such rights being granted exclusively to us except to the extent of any prior grants listed on Schedule "A" hereto.

(b) The non-exclusive right to record, and to license others to record, any part or all of any of the works on electrical transcriptions, wire, tape, film or otherwise, but only for the purpose of performing such work publicly by means of radio and television or for archive or audition purposes and not for sale to the public or for sychronization with motion pictures intended primarily for theatrical exhibition or with programs distributed by means of syndication to broadcasting stations.

(c) The non-exclusive right to adapt, arrange, change and dramatize any part or all of any of the works for performance purposes, and to license others to do so.

5. (a) The rights granted to us by sub-paragraph (a) of paragraph 4 hereof shall not include the right to perform or license the performance of more than one song or aria from an opera, operetta, or musical comedy or more than five minutes from a ballet if such performance is accompanied by the dramatic action, costumes or scenery of that opera, operetta, musical comedy or ballet.

(b) You, together with the publisher and your collaborators, if any, shall have the right jointly, by written notice to us, to exclude from the grant made by sub-paragraph (a) of paragraph 4 hereof performances of more than thirty (30) minutes' duration of a work which is an opera, operetta or musical comedy, but this right shall not apply to a work which is the score of a film originally written for exhibition in motion picture theaters when performed as incorporated in such film, or which is a score originally written for a radio or television program when performed as incorporated in such program.

6. (a) As full consideration for all rights granted to us hereunder, we agree to pay to you, with respect to each of the works in which we obtain and retain exclusive performing rights during the period:

(i) For performances of a work on broadcasting stations in the United States, its territories and possessions and Canada, amounts calculated pursuant to our then current standard practices upon the basis of the then current performance rates generally paid by us to our affiliated writers for similar performances of similar compositions. The number of performances for which you shall be entitled to payment shall be estimated by us in accordance with our then current system of computing the number of such performances.

(ii) All monies received by us from any performing rights licensing organization outside of the United States, its territories and possessions and Canada, which are designated by such performing rights licensing organization as the author's share of foreign performance royalties earned by your works after the deduction of ten percent (10%) of the gross amount thereof to cover our handling charge.

(b) In the case of a work composed by you with one or more collaborators, the sum payable to you hereunder shall be a pro rata share, determined on the basis of the number of collaborators, unless you shall have transmitted to us a copy of an agreement between you and your collaborators, providing for a different division of payment.

(c) We shall have no obligation to make payment hereunder with respect to (i) any performance of a work which occurs prior to the date on which we have received from you all of the information and material with respect to such work which is referred to in paragraph 2 or 3 hereof, or (ii) any performance of a work for which you receive payment of performance royalties from the publisher thereof. You waive the right to receive performance royalties from the publisher of any work with respect to any and all performances thereof for which you receive payment from us hereunder.

7. We will furnish statements to you at least twice during each year of the period showing the number of performances as computed pursuant to sub-paragraph (a) (i) of paragraph 6 hereof and at least once during each year of the period showing the monies due pursuant to sub-paragraph (a) (ii) of paragraph 6 hereof. Each statement shall be accompanied by payment to you, subject to all proper deductions for advances, if any, of the sum thereby shown to be due for such performances.

8. (a) Notwithstanding the termination of this agreement, we shall continue to make payments to you with respect to performances of any of the works in which we have exclusive performing rights for so long as we continue to have such exclusive rights; but nothing in this agreement shall require us to continue licensing any such work. The amounts of such payments shall be calculated pursuant to our then current standard practices upon the basis of the then current performance rates generally paid by us to our affiliated writers for similar performances of similar compositions.

(b) Our obligation to continue payment to you after the termination of this agreement for performances outside of the United States, its territories and possessions and Canada shall be dependent upon our receipt in the United States of payments designated by foreign performing rights organizations as the author's share of foreign performance royalties earned by your works. Payment of such foreign royalties shall be subject to deduction of our then current handling charge applicable to our affiliated writers.

9. In the event that you terminate this agreement pursuant to sub-paragraph (a) of paragraph 1 hereof at a time when, after crediting all earnings reflected by the statements rendered to you prior to the effective date of such termination, there remains an unearned balance of advances made to you by us, such termination shall not be effective with respect to the works then embraced by this agreement unless and until thirty (30) days after the unpaid balance of advances shall be repaid by you or until a statement is rendered by us at our normal accounting period showing that such unearned balance of advances has been fully recouped by us.

10. You warrant and represent that you have the right to enter into this agreement; that you are not bound by any prior commitments which conflict with your commitments hereunder; that each of the works, composed by you alone or with one or more collaborators, is original; and that exercise of the rights granted by you herein will not constitute an infringement of copyright or violation of any other right of, or unfair competition with, any person, firm or corporation. You agree to indemnify and hold harmless us and our licensees from and against any and all loss or damage resulting from any claim of whatever nature arising from or in connection with the exercise of any of the rights granted by you in this agreement. Upon notification to us or any of our licensees of a claim with respect to any of the works, we shall have the right to exclude such work from this agreement and/or to withhold payment of all sums which become due pursuant to this agreement or any modification thereof until such claim has been withdrawn, settled or adjudicated.

11. (a) We shall have the right, upon written notice to you, to exclude from this agreement, at any time, any work which in our opinion (i) is similar to a previously existing composition and might constitute a copyright infringement, or (ii) has a title or music or lyric similar to that of a previously existing composition and might lead to a claim of unfair competition, or (iii) is offensive, in bad taste or against public morals, or (iv) is not reasonably suitable for performance.

(b) In the case of works which in our opinion are based on compositions in the public domain, we shall have the right, upon written notice to you, either (i) to exclude any such work from this agreement, or (ii) to classify any such work as entitled to receive only a fraction of the full credit that would otherwise be given for performances thereof.

(c) In the event that any work is excluded from this agreement pursuant to paragraph 10 or sub-paragraph (a) or (b) of this paragraph 11, all rights in such work shall automatically revert to you ten (10) days after the date of our notice to you of such exclusion. In the event that a work is classified for less than full credit under sub-paragraph (b) (ii) of this paragraph 11, you shall have the right, by giving notice to us, within ten (10) days after the date of our letter advising you of the credit allocated to the work, to terminate our rights therein, and all rights in such work shall thereupon revert to you.

12. In each instance that you write, or are employed or commissioned by a motion picture producer to write, during the period, all or part of the score of a motion picture intended primarily for exhibition in theaters, or by the producer of a dramatico-musical work or revue for the legitimate stage to write, during the period, all or part of the musical compositions contained therein, we agree to advise the producer of the film that such part of the score as is written by you may be performed as part of the exhibition of said film in theaters in the United States, its territories and possessions, without compensation to us, or to the producer of the dramatico-musical work or revue that your compositions embodied therein may be performed on the stage with living artists as part of such dramatico-musical work or revue, without compensation to us. In the event that we notify you that we have established a system for the collection of royalties for performance of the scores of motion picture films in theaters in the United States, its territories and possessions, we shall no longer be obligated to take such action with respect to motion picture scores.

13. You make, constitute and appoint us, or our nominee, your true and lawful attorney, irrevocably during the term hereof, in our name or that of our nominee, or in your name, or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process or pleadings that may be necessary, proper or expedient to restrain infringement of and/or to enforce and protect the rights granted by you hereunder, and to recover damages in respect to or for the infringement or other violation of the said rights, and in our sole judgment to join you and/or others in whose names the copyrights to any of the works may stand; to discontinue, compromise or refer to arbitration, any such actions or proceedings or to make any other disposition of the disputes in relation to the works, provided that any action or proceeding commenced by us pursuant to the provisions of this paragraph shall be at our sole expense and for our sole benefit.

14. You agree that you, your agents, employees or representatives will not, directly or indirectly, solicit or accept payment from writers for composing music for lyrics or writing lyrics to music or for reviewing, publishing, promoting, recording or rendering other services connected with the exploitation of any composition, or permit use of your name or your affiliation with us in connection with any of the foregoing. In the event of a violation of any of the provisions of this paragraph 14, we shall have the right, in our sole discretion, by giving you at least thirty (30) days' notice by registered or certified mail, to terminate this agreement. In the event of such termination no payments shall be due to you pursuant to paragraph 8 hereof.

15. No monies due or to become due to you shall be assignable, whether by way of assignment, sale or power granted to an attorney-in-fact, without our prior written consent. If any assignment of such monies is made by you without such prior written consent, no rights of any kind against us will be acquired by the assignee, purchaser or attorney-in-fact.

16. All disputes of any kind, nature or description whatsoever arising in connection with the terms and conditions of this agreement, or arising out of the performance thereof, or based upon an alleged breach thereof, shall be submitted to arbitration in the City, County and State of New York under the then prevailing rules of the American Arbitration Association by an arbitrator or arbitrators to be selected as follows: Each of us shall by written notice to the other have the right to appoint one arbitrator, provided, however, that if within ten (10) days following the giving of such notice by one of us the other shall not by written notice appoint another arbitrator the first arbitrator appointed shall be the sole arbitrator. If two arbitrators are so appointed, they shall thereupon appoint the third arbitrator, provided that if ten (10) days shall elapse after the appointment of the second arbitrator and the said two arbitrators are unable to agree upon the appointment of the third arbitrator then either of us may, in writing, request the American Arbitration Association to appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on us and judgment may be, but need not be, entered thereon in any court having jurisdiction. Such award shall include the fixing of the cost of arbitration, which shall be borne by the unsuccessful party.

17. Any notice sent to you pursuant to the terms of this agreement shall be valid if addressed to you at the last address furnished by you in writing to our Department of Writer Administration.

18. This agreement cannot be changed orally and shall be governed and construed pursuant to the laws of the State of New York.

19. (see reverse side)

Very truly yours,

BROADCAST MUSIC, INC.

ACCEPTED AND AGREED TO:

.....

By .....

E 560

SCHEDULE "A"

TITLE	CO-WRITERS (if any)	YOUR PERCENTAGE OF WRITER CREDIT	PUBLISHER	ANY OTHER GRANT OF PERFORMING RIGHTS BY YOU OR YOUR CO-WRITERS

19. This agreement, as of its effective date, cancels and supersedes the agreement between us dated and all modifications thereof (herein called the "Superseded Agreement"). All works embraced by the Superseded Agreement shall be deemed included in Schedule "A" hereof.

E 561

CBS v. ASCAP

Plaintiffs' Exhibit No. 458

BMI Answer, dated 3/23/73, to CBS Interrogatory No. 26.

INTERROGATORY 26

Describe in full detail each formula, guideline, index, rule of thumb or other basis employed by the Society to determine the amount to be charged, and the royalty base on which to charge, each of the following categories of users of music for the right to perform publicly for profit any, some or all the musical compositions in the Society's pool:

(a) television networks;

(b) television stations;

(c) radio networks;

(d) radio stations;

(e) "talk" and/or "news" radio stations (as those terms are generally understood in the industry);

(f) wired music and related service companies;

(g) theaters;

(h) hotels;

(i) nightclubs;

(j) restaurants;

(k) orchestras; and

(l) any other user of music (identifying each).

SUPPLEMENTARY ANSWER

BMI seeks to obtain the highest fees it deems reasonable in the exercise of sound business judgment. In addition to the factors set forth in its earlier answer to this interrogatory, BMI takes into consideration such factors as the size and quality of the BMI repertory, the availability to the prospective licensee of the music in and to be added to the BMI repertory, the nature of the license, the amount of music it is anticipated the licensee will use, the ability of the licensee to pay, and competitive conditions in the music licensing industry.

E 563

CBS v. ASCAP

Plaintiffs' Exhibit No. 469

BMI Writer Payment Schedule in effect as of January 1, 1972 (Dated September 1972).

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

PX 469

E 564
September, 1972

BROADCAST MUSIC, INC.

WRITER PAYMENT SCHEDULE

The following is the payment schedule in effect as of January 1, 1972. It does not constitute a modification or amendment of any agreement to which BMI is a party. The rates described are subject to change by BMI at any time.

I. U. S. RADIO FEATURE PERFORMANCES

	Local A M		Local F M	Network A M
	Group 1	Group 2		
Popular Song	4¢	2½¢	½¢	6¢
Concert Work	4¢ per min.	2½¢ per min.	½¢ per min.	6¢ per min.
Multiple Credit Work	6¢	3¾¢	¾¢	9¢

II. U. S. RADIO THEMES

For performances of a work as the opening and closing theme regularly used at the opening and closing of a regularly scheduled program of not less than 25 minutes duration, one-half feature credit is given. Where the theme is used only as opening or closing, payment is made only if the usage consists of a full chorus or a minimum of 45 seconds.

III. U. S. TELEVISION FEATURE PERFORMANCES

	Local	Network	
		Group A	Group B
Popular Song	24¢	36¢	24¢
Concert Work	24¢ per min.	36¢ per min.	24¢ per min.
Multiple Credit Work	72¢	$1.08	72¢

IV. U. S. TELEVISION THEMES

Local	Network
12¢ per ½ hr. show	18¢ per ½ hr. show

V. U. S. TELEVISION BACKGROUND MUSIC

Local	Network	
	Group A	Group B
7¢ per min.	12¢ per min.	10½¢ per min.

A. RULES AND DEFINITIONS (GENERAL)

1. A "concert work" is a symphony, concerto, or other serious work originally written for concert or opera performance. The indicated credit per minute of performance will be allowed only for feature performances and will not be allowed for rhythm or popular arrangements of concert works.

2. "Multiple Credit Work" is a work which meets the qualifications described in one or more subdivisions of this Section 2. Multiple credit is allowed only for feature performances of a work. Works qualifying for multiple credit are:

a. "Broadway show music": a composition from an original score written for and performed for the run of the play in a musical comedy, revue or operetta in a first-class legitimate Broadway theatre.

b. "Off-Broadway show music": a composition from an original score written for and performed for the run of the play in a musical comedy, revue or operetta in an Off-Broadway theatre as that term is understood in the theatrical industry and for which an original cast album has been released. This multiple credit will apply only to Off-Broadway shows which opened after October 1, 1966.

c. "Movie work": a complete musical work originally written for and performed in full in a full-length motion picture which is (a) released in the United States after September 1, 1962, and (b) shown in motion picture theatres in the United States prior to any television release.

d. "Million-performance work": a composition which achieves 1,000,000 or more logged U. S. and Canadian broadcast feature performances during the period it has been in the BMI repertoire. The rate provided for a "million-performance work" (i) will be effective commencing with the quarter following that in which it reached 1,000,000 such performances, and (ii) will not be applicable to works which are already receiving multiple credit under Section 1, or subdivisions (a) (b) or (c) of Section 2 of this paragraph A.

B. RULES AND DEFINITIONS (RADIO)

1. A Group 1 radio station is a station which, for the latest calendar year prior to the performance for which figures are available, has paid BMI $3,000 or more. A Group 2 station is one which for the same period paid less than $3,000.

2. Networks at present are ABC, CBS, MUTUAL and NBC. Network rates described above are multiplied by the number of interconnected stations carrying the performance.

3. A feature performance is a performance of not less than 90 seconds duration which is the sole sound broadcast at the time of the performance and which therefore constitutes the sole focus of audience attention.

4. No payment is made: (a) for partial performance of a work on radio (other than concert uses) except for thematic use, (b) for performance of a work as part of a commercial or promotional announcement or as a station or network identification, (c) for performances as background or cue music.

5. No credit is given for any composition which has not been cleared by BMI in the manner required by BMI's writer contract.

C. RULES AND DEFINITIONS (TELEVISION)

1. GENERAL

a. A Group A Time program is any television program broadcast between the hours of 6:00 P. M. and 11:00 P. M., and a musical or variety program produced especially for television which is broadcast between the hours of 11:00 P. M. and 1:00 A. M. All other programs are deemed broadcast in Group B Time.

b. Networks are presently ABC, CBS, and NBC. The network rates described above are multiplied by the number of interconnected stations carrying a performance.

c. No payment is made for performance of a work as part of a commercial or promotional announcement or as a station or network identification.

d. No credit is given for any composition which has not been cleared by BMI in the manner required by BMI's writer contract, except that background credit will be given for performance of music where proprietorship can be established.

2. FEATURE

a. A feature performance is a performance that constitutes the main focus of audience attention at the time of the performance. If the performance of the work is vocal or instrumental, the vocalists and or instrumentalists, respectively, must be on camera, except where the music is used as part of a choreographic routine which constitutes the main focus of attention.

b. Feature performances of less than 45 seconds but at least 15 seconds duration will receive one-half feature credit. Feature performances of less than 15 seconds or shown only as partial performances will be credited at 3¢ per network usage and 2¢ for local usage. At no time shall accumulation of partial credits total more than one full credit per half hour show.

3. THEME

a. A theme comprises both the opening and closing musical works performed on a program. Half payment is made where there is only an opening or a closing work. Payment is per half hour show and themes for shows of other durations are credited in proportion. Performances of the theme, other than opening and closing, are credited at background rates. For shows telecast more than three times weekly, theme payment will be at two-thirds of the usual rate.

b. Where a movie or film series has a theme within the film, an additional theme used by the station or network to identify the series will be credited at two-thirds of the usual rate.

4. BACKGROUND

a. Background music is music used other than as feature or theme. Music used as background to screen credits or to promotional or commercial announcement receives no credit.

b. With respect to shows other than those specified in Sections c. and d. below:

(1) Payment for background music is based on the use of music up to one-half of the duration of the program. For uses in excess of one-half of the duration of the program, a proportional reduction will be made for the purpose of division among the writers entitled thereto, but payment will not exceed that which would have been made for a usage of one-half of the program duration.

(2) On programs broadcast more than three times a week, the rate for background music is one-half the usual rate, unless the music is performed on a single instrument in which case it is computed at one-third the usual rate.

c. The rate of payment for background music in full length feature films shown in motion picture theatres in the United States prior to television release will be 12¢ per minute when performed as part of the broadcast of the motion picture regardless of whether such broadcast is local or Group A or Group B network.

d. The rate of payment for background music used on quiz and audience participation shows of one-half hour duration is as follows: music performed (1) between one and one half minutes and three minutes by less than four instruments, 5.74¢ (2) three minutes or more by less than four instruments, or between one and one-half minutes and three minutes, by four or more instruments, 16.51¢ (3) more than three minutes by four or more instruments, 30.87¢. For shows of duration other than one-half hour, proportional payment shall be made.

e. Where the log or cue sheet for a program, film or film series does not indicate the timing of the background music involved but indicates the music used and identifies its writers, BMI will assign the credits on the basis of the following number of minutes per half-hour for the following categories of shows:

Situation comedy	4 minutes
Playhouse	6 minutes
Drama, Western, Mystery, Adventure and Cartoon	8 minutes
Travelogue	12 minutes

f. Untimed background music used for debates, discussions, newscasts, lectures, commentaries and similar programs shall receive payment at 2¢ per usage for network performances with a limit of 6¢ per half hour, and at 1¢ per usage for local performances with a limit of 3¢ per half hour.

g. As to programs or series not covered by e. or f. hereof, BMI may determine the timing on the basis of seven random air checks of the program each quarter.

h. Untimed background music used to mark entrances, exits, play-ons, play-offs and change of scene shall be credited at 2¢ per usage for network performance and 1¢ per usage for local performance unless the music utilized has been previously cleared as a feature work, and serves to identify the period of the scene, or is associated with the personality of the artist, in which case the rate shall be 3¢ per usage for network performance and 2¢ per usage for local performance.

D. MISCELLANEOUS

1. For performances of works in Canada, BMI will pay amounts calculated in accordance with the then current applicable performance rates established by the performing rights licensing organization in Canada without deductions for handling or administrative expenses.

2. Performance royalties received by BMI from performing rights licensing organizations outside the United States and Canada which are designated as the writers' share of performance royalties are distributed to the writer(s) of each work for which payment is made after deduction of 10% of the gross amount received for handling and administrative expenses.

3. Where BMI receives payment for performances on 3-M tapes and obtains adequate information as to the musical works utilized thereon, BMI will pay to the writer(s) of each such musical work a pro-rata share of not less than ninety (90%) percent of not less than fifty (50%) percent of the amount so received from 3-M based upon the ratio between such writer's work so utilized and the total number of BMI licensed compositions utilized on such tape.

4. BMI cannot undertake to distinguish between lyric and instrumental performances of a work unless the two versions bear different titles.

If the lyric and instrumental versions are known by different titles, performances of the instrumental version will be credited solely to the composer unless BMI is notified by all writers involved of an agreement between them that the author of the lyric is entitled to share in performance royalties of the instrumental version.

Where the lyric and instrumental versions are known by the same title, the lyrist will be credited with 50% of the logging credit for all performances unless BMI is notified by all writers involved of an agreement between them that the lyrist is to be credited only for a stated percentage of all logged performances.

5. If more than one musical work is recorded on one side of a 45 RPM record or other mechanical reproduction of equivalent duration: (a) if no more than 2 musical works are involved in such a recording, each work receives full logging credit if the performance of each work consists of a full chorus or more or (b) if more than 2 works are used on such a recording, a single logging credit is divided among all the musical works so used in equal shares but BMI will accept a directive from all the publishers of the works involved to divide the single logging credit in percentages agreed upon by such publishers.

The above rule is also applicable to musical works used as a medley, unit or single band on a long playing record or tape except that if such medley, unit or single band runs in excess of 5 minutes playing time a full logging credit is awarded to each musical work of which a full chorus or more is performed and a single logging credit is divided equally among all other works comprising the medley, unit or single band.

E. BONUS PAYMENTS

1. A writer whose earnings for logged United States and Canadian broadcast feature performances are $1,500 or more but less than $3,000 per year for any three of the last five years for which performance figures are available is eligible to enter into an agreement with BMI for a term of three years following qualification providing for an additional payment equal to 25% of his earnings for logged United States broadcast feature performances during such three-year term.

2. A writer whose earnings for logged United States and Canadian broadcast feature performances are $3,000 or more per year for any three of the last five years for which performance figures are available is eligible to enter into an agreement with BMI for a term of three years following qualification providing for an additional payment equal to 50% of his earnings for logged United States broadcast feature performances during such three-year term.

3. A writer is also eligible to enter into an agreement such as described in Subdivision 2. of this Section E if the writer's earnings for logged United States and Canadian broadcast feature performances are $9,000 or more during the last three consecutive years for which performance figures are available providing that in each of the last two of the three years the writer's said earnings shall be $1,500 or more.

4. A writer whose earnings for logged United States and Canadian broadcast feature performances are $4,500 or more but less than $9,000 in the last four quarters for which performance figures are available is eligible to enter into an agreement with BMI for a term of three years following qualification providing for an additional payment equal to 25% of his earnings for logged United States broadcast feature performances during such three-year term.

5. A writer whose earnings for logged United States and Canadian broadcast feature performances are $9,000 or more in the last four quarters for which performance figures are available is eligible to enter into an agreement with BMI for a term of three years following qualification providing for an additional payment equal to 50% of his earnings for logged United States broadcast feature performances during such three-year term.

6. Bonuses described in Subdivisions 1 through 5 hereof are not cumulative.

E 570

CBS v. ASCAP

Plaintiffs' Exhibit No. 470

BMI Publisher Payment Schedule in effect as of January 1, 1972 (Dated September 1972).

U. S. DIST. COURT
S. D. OF N. Y.
DEC 1973
PX 470

E 571

September, 1972

BROADCAST MUSIC, INC.

PUBLISHER PAYMENT SCHEDULE

The following is the payment schedule in effect as of January 1, 1972. It does not constitute a modification or amendment of any agreement to which BMI is a party. The rates described are subject to change by BMI at any time.

I. U. S. RADIO FEATURE PERFORMANCES

	Local A M		Local F M	Network A M
	Group 1	Group 2		
Popular Song	4¢	2½¢	½¢	6¢
Concert Work	4¢ per min.	2½¢ per min.	½¢ per min.	6¢ per min.
Multiple Credit Work	6¢	3¾¢	¾¢	9¢

II. U. S. RADIO THEMES

For performances of a work as the opening and closing theme regularly used at the opening and closing of a regularly scheduled program of not less than 25 minutes duration, one-half feature credit is given. Where the theme is used only as opening or closing, payment is made only if the usage consists of a full chorus or a minimum of 45 seconds.

III. U. S. TELEVISION FEATURE PERFORMANCES

	Local	Network	
		Group A	Group B
Popular Song	24¢	36¢	24¢
Concert Work	24¢ per min.	36 ¢ per min.	24¢ per min.
Multiple Credit Work	72¢	$1.08	72¢

IV. U. S. TELEVISION THEMES

Local	Network
12¢ per ½ hr. show	18¢ per ½ hr. show

V. U. S. TELEVISION BACKGROUND MUSIC

Local	Network	
	Group A	Group B
7¢ per min.	12¢ per min.	10½¢ per min.

A. RULES AND DEFINITIONS (GENERAL)

1. A "concert work" is a symphony, concerto, or other serious work originally written for concert or opera performance. The indicated credit per minute of performance will be allowed only for feature performances and will not be allowed for rhythm or popular arrangements of concert works.

2. "Multiple Credit Work" is a work which meets the qualifications described in one or more subdivisions of this Section 2. Multiple credit is allowed only for feature performances of a work. Works qualifying for multiple credit are:

a. "Broadway show music": a composition from an original score written for and performed for the run of the play in a musical comedy, revue or operetta in a first-class legitimate Broadway theatre.

b. "Off-Broadway show music": a composition from an original score written for and performed for the run of the play in a musical comedy, revue or operetta in an Off-Broadway theatre as that term is understood in the theatrical industry and for which an original cast album has been released. This multiple credit will apply only to Off-Broadway shows which opened after October 1, 1966.

c. "Movie work": a complete musical work originally written for and performed in full in a full-length motion picture which is (a) released in the United States after September 1, 1962, and (b) shown in motion picture theatres in the United States Prior to any television release.

d. "Million-performance work": a composition which achieves 1,000,000 or more logged U.S. and Canadian broadcast feature performances during the period it has been in the BMI repertoire. The rate provided for a "million performance work" (i) will be effective commencing with the quarter following that in which it reached 1,000,000 such performances, and (ii) will not be applicable to works which are already receiving multiple credit under Section 1, or subdivisions (a) (b) or (c) of Section 2 of this paragraph A.

B. RULES AND DEFINITIONS (RADIO)

1. A Group 1 radio station is a station which, for the latest calendar year prior to the performance for which figures are available has paid BMI $3,000 or more. A Group 2 station is one which for the same period paid less than $3,000.

2. Networks at present are ABC, CBS, MUTUAL and NBC. Network rates described above are multiplied by the number of interconnected stations carrying the performance.

3. A feature performance is a performance of not less than 90 seconds duration which is the sole sound broadcast at the time of the performance and which therefore constitutes the sole focus of audience attention.

4. No payment is made: (a) for partial performance of a work on radio, (other than concert uses) except for thematic use, (b) for performance of a work as part of a commercial or promotional announcement or as a station or network identification, (c) for performances as background or cue music.

5. No credit is given for any composition which has not been cleared by BMI in the manner required by BMI's publisher contract.

C. RULES AND DEFINITIONS (TELEVISION)

1. GENERAL

a. A Group A Time program is any television program broadcast between the hours of 6:00 P. M. and 11:00 P. M., and a musical or variety program produced especially for television which is broadcast between the hours of 11:00 P. M. and 1:00 A. M. All other programs are deemed broadcast in Group B Time.

b. Networks are presently ABC, CBS, and NBC. The network rates described above are multiplied by the number of interconnected stations carrying a performance.

c. No payment is made for performance of a work as part of a commercial or promotional announcement or as a station or network identification.

d. No credit is given for any composition which has not been cleared by BMI in the manner required by BMI's publisher contract, except that background credit will be given for performance of music where proprietorship can be established.

2. FEATURE

a. A feature performance is a performance that constitutes the main focus of audience attention at the time of the performance. If the performance of the work is vocal or instrumental, the vocalists and or instrumentalists, respectively, must be on camera, except where the music is used as part of a choreographic routine which constitutes the main focus of attention.

b. Feature performances of less than 45 seconds but at least 15 seconds duration will receive one-half feature credit. Feature performances of less than 15 seconds or shown only as partial performances will be credited at 3¢ per network usage and 2¢ for local usage. At no time shall accumulation of partial credits total more than one full credit per half hour show.

3. THEME

a. A theme comprises both the opening and closing musical works performed on a program. Half payment is made where there is only an opening or a closing work. Payment is per half hour show and themes for shows of other durations are credited in proportion. Performances of the theme, other than opening and closing, are credited at background rates. For shows telecast more than three times weekly, theme payment will be at two-thirds of the usual rate.

b. Where a movie or film series has a theme within the film, an additional theme used by the station or network to identify the series will be credited at two-thirds of the usual rate.

4. BACKGROUND

a. Background music is music used other than as feature or theme. Music used as background to screen credits or to promotional or commercial announcement receives no credit.

b. With respect to shows other than those specified in Sections c. and d. below

(1) Payment for background music is based on the use of music up to one-half of the duration of the program. For uses in excess of one-half of the duration of the program, a proportional reduction will be made for the purpose of division among the publishers entitled thereto, but payment will not exceed that which would have been made for a usage of one-half of the program duration.

(2) On programs broadcast more than three times a week, the rate for background music is one-half the usual rate, unless the music is performed on a single instrument, in which case it is computed at one-third the usual rate.

c. The rate of payment for background music in full length feature films shown in motion picture theatres in the United States prior to television release will be 12¢ per minute when performed as part of the broadcast of the motion picture regardless of whether such broadcast is local or Group A or Group B network.

d. The rate of payment for background music used on quiz and audience participation shows of one-half hour duration is as follows: music performed (1) between one and one-half minutes and three minutes by less than four instruments, 5.74¢ (2) three minutes or more by less than four instruments, or between one and one-half minutes and three minutes, by four or more instruments, 16.51¢, (3) more than three minutes by four or more instruments, 30.87¢. For shows of duration other than one-half hour, proportional payment shall be made.

e. Where the log or cue sheet for a program, film or film series does not indicate the timing of the background music involved but indicates the music use and identifies its publishers, BMI will assign the credits on the basis of the following number of minutes per half hour for the following categories of shows:

Situation Comedy	4 minutes
Playhouse	6 minutes
Drama, Western, Mystery, Adventure and Cartoon	8 minutes
Travelogue	12 minutes

f. Untimed background music used for debates, discussions, newscasts, lectures, commentaries and similar programs shall receive payment at 2¢ per usage for network performances with a limit of 6¢ per half hour, and at 1¢ per usage for local performances with a limit of 3¢ per half hour.

g. As to programs or series not covered by e. or f. hereof, BMI may determine the timing on the basis of seven random air checks of the program each quarter.

h. Untimed background music used to mark entrances, exits, play-ons, play-offs and change of scene shall be credited at 2¢ per usage for network performance and 1¢ per usage for local performance unless the music utilized has been previously cleared as a feature work, and serves to identify the period of the scene, or is associated with the personality of the artist, in which case the rate shall be 3¢ per usage for network performance and 2¢ per usage for local performance.

D. MISCELLANEOUS

1. For performances of works in Canada, BMI will pay amounts calculated in accordance with the then current applicable performance rates established by the performing rights licensing organization in Canada without deductions for handling or administrative expenses.

2. Performance royalties received by BMI from performing rights licensing organizations outside the United States and Canada which are designated as the publishers' share of performance royalties are distributed to the publisher(s) of each work for which payment is made after deduction of 10% of the gross amount received for handling and administrative expenses.

3. Where BMI receives payment for performances on 3-M tapes and obtains adequate information as to the musical works utilized thereon, BMI will pay to the publisher(s) of each such musical work a pro rata share of not less than ninety (90%) percent of not less than fifty (50%) percent of the amount so received from 3-M based upon the ratio between such publisher's work so utilized and the total number of BMI licensed compositions utilized on such tape.

4. Payment to a BMI affiliated publisher for a work originally published by a member of a performing rights licensing organization outside the United States, its territories and possessions and Canada with which BMI has contractual relations, is made, except as hereinafter noted, at the full applicable rate for the type of performance with no deduction for the original publisher. BMI currently makes payment to the society of the original publisher of an equal amount as the share of the original publisher. However, where theme and/or background music (other than music contained in full length feature motion pictures made for theatrical release) was originally published by a foreign publisher and is subpublished by a BMI publisher, the publisher share of the television performance payments, as described in the schedule, will be divided fifty percent (50%) to the foreign society to which the foreign publisher belongs, for the account of such publisher, and fifty percent (50%) to the BMI affiliated publisher who controls the United States and Canadian performing rights, unless BMI receives specific instructions from the foreign society that the division of royalties should be other than equal.

5. BMI cannot undertake to distinguish between lyric and instrumental performances of a work unless the two versions bear different titles.

If the lyric and instrumental versions are known by different titles, performances of the instrumental version will be credited solely to the composer and to the publisher of the instrumental version unless BMI is notified by all parties involved of an agreement between them that the author of the lyric and the publisher of the lyric version are entitled to share in performance royalties of the instrumental version.

Where the lyric and instrumental versions are known by the same title, the lyrist and the publisher of the lyric version will each be credited respectively with 50% of the applicable writer and publisher logging credit for all performances unless BMI is notified by all parties involved of an agreement between them that the lyrist and the publisher of the lyric version are to be credited only for a stated percentage of all logged performances.

6. If more than one musical work is recorded on one side of a 45 RPM record or other mechanical reproduction of equivalent duration: (a) if no more than 2 musical works are involved in such a recording each work receives full logging credit if the performance of each work consists of a full chorus or more or (b) if more than 2 works are used on such a recording, a single logging credit is divided among all the musical works so used in equal shares but BMI will accept a directive from all the publishers of the works involved to divide the single logging credit in percentages agreed upon by such publishers.

The above rule is also applicable to musical works used as a medley, unit or single band on a long playing record or tape except that, if such medley, unit or single band runs in excess of 5 minutes playing time, a full logging credit is awarded to each musical work of which a full chorus or more is performed and a single logging credit is divided equally among all other works comprising the medley, unit or single band.

7. BONUS PAYMENTS

(a) A BMI publisher whose works have received in excess of 300,000 but less than 500,000 logged United States broadcast feature performances during the last four quarters for which performance figures are available is entitled to receive an additional payment equal to 25% of the monies payable for logged United States broadcast feature performances during the one year period following the quarter in which the publisher becomes eligible for such payment provided that the publisher's basic agreement with BMI is not subject to termination during such one year period.

(b) A BMI publisher whose works have received in excess of 500,000 logged United States broadcast feature performances during the last four quarters for which performance figures are available is entitled to receive an additional payment equal to 50% of the monies payable for logged United States broadcast feature performances during the one year period following the quarter in which the publisher becomes eligible for such payment provided that the publisher's basic agreement with BMI is not subject to termination during such one year period.

(c) The bonuses described in subdivisions (a) and (b) hereof are not cumulative.

(d) For purposes of determining a publisher's qualification for the bonus described in (a) and (b) hereof:

(I) Performances of the works of two or more publishers shall be computed together for the purpose of determining bonus eligibility only if the publishing companies have identical ownership or if the performances of such publishing companies were computed together for such purpose prior to July 1, 1968.

(II) Except as described in subdivision (I) hereof, no performances shall be included in a computation for bonus qualification other than those accruing to the publisher under a direct affiliation agreement between publisher and BMI pursuant to which performing rights have been granted by publisher directly to BMI.

8. A work assigned from one BMI publisher to another will be credited to the assignee commencing with the calendar quarter following the receipt of notice by BMI of the assignment. The recognition of such assignment shall be subject to appropriate adjustment with respect to monies advanced by BMI to the assignor publishing company.

E 577

CBS v. ASCAP

Plaintiffs' Exhibit No. 471A

BMI-Publisher Affiliation Agreement with a publisher where no previous agreement between the parties existed.

E 578

AGREEMENT made this day of , 19 , between BROADCAST MUSIC, INC., a New York corporation, whose address is 40 West 57th Street, New York, N.Y. 10019 (hereinafter called "BMI") and .....

a corporation .....doing business under the firm name and style of.....whose address is .....

Street or Avenue) (City) (State) (Zip)

(hereinafter called "Publisher").

WITNESSETH:

FIRST: The term of this agreement shall be the period of five (5) years from ..... to ....., and continuing thereafter for additional periods of five (5) years each unless terminated by either party at the end of such initial period, or any such additional five (5) year period, upon notice by registered or certified mail not more than six (6) months or less than three (3) months prior to the end of any such term.

SECOND: As used in this agreement, the word "works" shall mean:

A. All musical and dramatico-musical compositions, whether published or unpublished, now owned or copyrighted by Publisher or in which Publisher owns or controls performing rights, and

B. All musical and dramatico-musical compositions, whether published or unpublished, in which hereafter during the term Publisher acquires ownership or copyright or ownership or control of the performing rights, from and after the date of the acquisition by Publisher of such ownership or control.

THIRD: Publisher hereby sells, assigns and transfers to BMI, its successors or assigns, for the term of this agreement:

A. All the rights which Publisher owns or acquires publicly to perform, and to license others to perform, for profit or otherwise, anywhere in the world, any part or all of the works, such rights being granted exclusively to BMI except to the extent of any prior grant listed on clearance sheets or cue sheets submitted pursuant to subparagraph A of paragraph TENTH with respect to works heretofore acquired by Publisher.

B. The non-exclusive right to record, and to license others to record, any part or all of any of the works on electrical transcriptions, wire, tape, film or otherwise, but only for the purpose of performing such work publicly by means of radio and television or for archive or audition purposes and not for sale to the public or for synchronization with motion pictures intended primarily for theatrical exhibition or with programs distributed by means of syndication to broadcasting stations.

C. The non-exclusive right to adapt, arrange, change and dramatize any part or all of any of the works for performance purposes, and to license others to do so.

FOURTH:

A. The rights granted to BMI by subparagraph A of paragraph THIRD hereof shall not include the right to perform or license the performance of more than one song or aria from an opera, operetta or musical comedy or more than five (5) minutes from a ballet if such performance is accompanied by the dramatic action, costumes or scenery of that opera, operetta, musical comedy or ballet.

B. Publisher, together with all the writers and co-publishers, if any, of a work, shall have the right jointly, by written notice to BMI, to exclude from the grant made by subparagraph A of paragraph THIRD hereof performances of more than thirty (30) minutes' duration of a work which is an opera, operetta or musical comedy, but this right shall not apply to a work which is the score of a film originally produced for exhibition in motion picture theaters when performed as incorporated in such film, or which is a score originally written for a radio or television program when performed as incorporated in such program.

FIFTH:

A. As full consideration for all rights granted to BMI hereunder, BMI agrees to make the following payments to Publisher with respect to each of the works in which BMI has exclusive performing rights:

(1) For performances of works on broadcasting stations in the United States, its territories and possessions and Canada BMI will pay amounts calculated pursuant to BMI's then standard practices upon the basis of the then current performance rates generally paid by BMI to its affiliated publishers for similar performances of similar compositions. The number of performances for which Publisher shall be entitled to payment shall be estimated by BMI in accordance with its then current system of computing the number of such performances.

(2) For performances of works outside of the United States, its territories and possessions and Canada BMI will pay to Publisher all monies received by BMI in the United States from any performing rights licensing organization which are designated by such organization as the publisher's share of foreign performance royalties earned by any of the works after deduction of ten percent (10%) of the gross amount thereof to cover BMI's handling charge.

(3) In the case of works which, or rights in which, are owned by Publisher jointly with one or more other publishers who have granted performing rights therein to BMI, the sum payable to Publisher under this subparagraph A shall be a pro rata share determined on the basis of the number of publishers, unless BMI shall have received from Publisher a copy of an agreement or other document signed by all of the publishers, providing for a different division of payment.

B. Notwithstanding the foregoing provisions of this paragraph FIFTH, BMI shall have no obligation to make payment hereunder with respect to any performance of a work which occurs prior to the date on which BMI shall have received from Publisher all of the material with respect to such work referred to in subparagraphs A and D(1) of paragraph TENTH hereof, and in the case of foreign performances, the information referred to in subparagraph B of paragraph FOURTEENTH hereof.

SIXTH: BMI will furnish statements to Publisher at least twice during each year of the term showing the number of performances of the works as computed pursuant to subparagraph A(1) of paragraph FIFTH hereof, and at least once during each year of the term showing the monies received by BMI referred to in subparagraph A(2) of paragraph FIFTH hereof. Each such statement shall be accompanied by payment of the sum thereby shown to be due to Publisher, subject to all proper deductions, if any, for advances or amounts due to BMI from Publisher.

SEVENTH:

A. Nothing in this agreement requires BMI to continue to license the works subsequent to the termination of this agreement. In the event that BMI continues to license any or all of the works, however, BMI shall continue to make payments to Publisher for so long as Publisher does not make or purport to make directly or indirectly any grant of performing rights in such works to any other licensing organization. The amounts of such payments shall be calculated pursuant to BMI's then current standard practices upon the basis of the then current performance rates generally paid by BMI to its affiliated publishers for similar performances of similar compositions. Publisher agrees to notify BMI by registered or certified mail of any grant or purported grant by Publisher directly or indirectly of performing rights to any other performing rights organization within ten (10) days from the making of such grant or purported grant and if Published fails so to inform BMI thereof and BMI makes payments to Publisher for any period after the making of any such grant or purported grant, Publisher agrees to repay to BMI all amounts so paid by BMI promptly on demand. In addition, if BMI inquires of Publisher by registered or certified mail, addressed to Publisher's last known address, whether Publisher has made any such grant or purported grant and Publisher fails to confirm to BMI by registered or certified mail within thirty (30) days of the mailing of such inquiry that Publisher has not made any such grant or purported grant, BMI may, from and after such date, discontinue making any payments to Publisher. In the event that Publisher subsequently certifies to BMI by registered or certified mail that it has made no such grant or purported grant, BMI shall resume payments to Publisher commencing with the calendar quarter immediately following the giving of such notice by Publisher.

B. BMI's obligation to continue payment to Publisher after the termination of this agreement for performances outside of the United States, its territories and possessions and Canada shall be dependent upon BMI's receipt in the United States of payments designated by foreign performing rights licensing organizations as the publisher's share of foreign performance royalties earned by any of the works. Payment of such foreign royalties shall be subject to deduction of BMI's then current handling charge applicable to its affiliated publishers.

EIGHTH: In the event that this agreement shall terminate at a time when, after crediting all earnings reflected by the statements rendered to Publisher prior to the effective date of such termination, there is an indebtedness from Publisher to BMI, for advances or otherwise, such termination shall not be effective with respect to the works then embraced by this agreement until thirty (30) days after such indebtedness shall be paid by Publisher or until a statement is rendered by BMI at its normal accounting period showing that the amount of such indebtedness has been fully recouped by BMI.

NINTH:

A. BMI shall have the right, upon written notice to Publisher, to exclude from this agreement, at any time, any work which in its opinion (1) is similar to a previously existing composition and might constitute a copyright infringement, or (2) has a title or music or lyric similar to that of a previously existing composition and might lead to a claim of unfair competition, or (3) is offensive, in bad taste or against public morals, or (4) is not reasonably suitable for performance.

B. In the case of works which in the opinion of BMI are based on compositions in the public domain, BMI shall have the right, at any time, upon written notice to Publisher, either (1) to exclude any such work from this agreement, or (2) to classify any such work as entitled to receive only a stated fraction of the full credit that would otherwise be given for performances thereof.

C. In the event that any work is excluded from this agreement pursuant to subparagraph A or B of this paragraph NINTH, or pursuant to subparagraph C of paragraph TWELFTH hereof, all rights of BMI in such work shall automatically revert to Publisher ten (10) days after the date of the notice of such exclusion given by BMI to Publisher. In the event that a work is classified for less than full credit under subparagraph B(2) of this paragraph NINTH, Publisher shall have the right, by giving notice to BMI within ten (10) days after the date of BMI's notice to Publisher of the credit allocated to such work, to terminate all rights in such work granted to BMI herein and all such rights of BMI in such work shall revert to Publisher thirty (30) days after the date of such notice from Publisher to BMI.

TENTH:

A. With respect to each of the works which has been or shall be published or recorded commercially or synchronized with motion picture or television film or tape or which Publisher considers likely to be performed, Publisher agrees to furnish to BMI:

(1) Two copies of a completed clearance sheet in the form supplied by BMI, unless a cue sheet with respect to such work is furnished pursuant to subparagraph A(3) of this paragraph TENTH.

(2) A legible lead sheet or other written or printed copy of such work setting forth the lyrics, if any, and music correctly metered: provided that with respect to a work used solely as background music, such copy need be furnished only if requested by BMI.

(3) If such work has been or shall be synchronized with or otherwise used in connection with motion picture or television film or tape, a cue sheet showing the title, composers, publisher and nature and duration of the use of the work in such film or tape.

B. Publisher shall submit the material described in subparagraph A of this paragraph TENTH with respect to works heretofore published, recorded or synchronized within ten (10) days after the execution of this agreement and with respect to any of the works hereafter so published, recorded, synchronized or likely to be performed prior to the date of publication or release of the recording, film or tape or anticipated performance.

C. The submission of each clearance sheet or cue sheet shall constitute a warranty by Publisher that all of the information contained thereon is true and correct and that no performing rights in any of the works listed thereon has been granted to or reserved by others except as specifically set forth therein.

D. Publisher agrees:

(1) To submit to BMI, from time to time, so far as known to Publisher, the manufacturers' names, catalog numbers and the names of the recording artists with respect to all phonograph records, tapes, electrical transcriptions and other reproductions made of any of the works.

(2) To secure and maintain copyright protection of the works pursuant to the Copyright Law of the United States and pursuant to the laws of such other nations of the world where such protection is afforded; and to give BMI prompt written notice of the date and number of copyright registration and/or renewal of each work registered in the United States Copyright Office.

(3) To obtain and deliver to BMI any written agreements, assignments, instruments or documents of any kind with respect to any of the works which BMI may reasonably require.

ELEVENTH: Publisher warrants and represents that:

A. Publisher has the right to enter into this agreement; Publisher is not bound by any prior commitments which conflict with its undertakings herein; the rights granted by Publisher to BMI herein are the sole and exclusive property of Publisher and are free from all encumbrances and claims; and exercise of such rights will not constitute infringement of copyright or violation of any right of, or unfair competition with, any person, firm, corporation or association.

B. Except with respect to works in which the possession of performing rights by another person, firm, corporation or association is specifically set forth on a clearance sheet or cue sheet submitted to BMI pursuant to subparagraph A of paragraph TENTH hereof, Publisher has exclusive performing rights in each of the works by virtue of written grants thereof to Publisher signed by all the authors and composers or other owners of such work.

TWELFTH:

A. Publisher agrees to defend, indemnify, save and hold BMI, its licensees, the advertisers of its licensees and their respective agents, servants and employees, free and harmless from and against any and all demands, loss, damage, suits, judgments, recoveries and costs, including counsel fees, resulting from any claim of whatever nature arising from or in connection with the exercise of any of the rights granted by Publisher in this agreement; provided, however, that the obligations of Publisher under this paragraph TWELFTH shall not apply to any matter added to, or changes made in, any work by BMI or its licensees.

B. Upon the receipt by any of the parties herein indemnified of any notice, demand, process, papers, writ or pleading, by which any such claim, demand, suit or proceeding is made or commenced against them, or any of them, which Publisher shall be obliged to defend hereunder, BMI shall, as soon as may be practicable, give Publisher notice thereof and deliver to Publisher such papers or true copies thereof, and BMI shall have the right to participate by counsel of its own choice, at its own expense. Publisher agrees to cooperate with BMI in all such matters.

C. In the event of such notification of claim or service of process on any of the parties herein indemnified, BMI shall have the right, from the date thereof, to exclude the work with respect to which a claim is made from this agreement and/or to withhold payment of all sums which may become due pursuant to this agreement or any modification thereof until such claim has been withdrawn, settled or adjudicated.

THIRTEENTH: Publisher makes, constitutes and appoints BMI, or its nominee, Publisher's true and lawful attorney, irrevocably during the term hereof, in the name of BMI or that of its nominee, or in Publisher's name, or otherwise, to do all acts, take all proceedings, and execute, acknowledge and deliver any and all instruments, papers, documents, process or pleadings that may be necessary, proper or expedient to restrain infringement of and/or to enforce and protect the rights granted by Publisher hereunder, and to recover damages in respect of or for the infringement or other violation of the said rights, and in BMI's sole judgment to join Publisher and/or others in whose names the copyrights to any of the works may stand, and to discontinue, compromise or refer to arbitration, any such actions or proceedings or to make any other disposition of the disputes in relation to the works; provided that any action or proceeding commenced by BMI pursuant to the provisions of this paragraph THIRTEENTH shall be at its sole expense and for its sole benefit.

FOURTEENTH:

A. It is acknowledged that BMI has heretofore entered into, and may during the term of this agreement enter into, contracts with performing rights licensing organizations for the licensing of public performing rights controlled by BMI in territories outside of the United States, its territories and possessions and Canada, (hereinafter called "foreign territories"). Upon Publisher's written request, BMI agrees to permit Publisher to grant performing rights in any or all of the works for any foreign territory for which, at the time such request is received, BMI has not entered into any such contract with a performing rights licensing organization; provided, however, that any such grant of performing rights by Publisher shall terminate at such time when BMI shall have entered into such a contract with a performing rights licensing organization covering such foreign territory and shall have notified Publisher thereof. Nothing herein contained, however, shall be deemed to restrict Publisher from assigning to its foreign publisher or representative the right to collect a part or all of the publishers' performance royalties earned by any or all of the works in any foreign territory as part of an agreement for the publication, exploitation or representation of such works in such territory, whether or not BMI has entered into such a contract with a performing rights licensing organization covering such territory.

B. Publisher agrees to notify BMI promptly in writing in each instance when publication, exploitation or other rights in any or all of the works are granted for any foreign territory. Such notice shall set forth the title of the work, the country or countries involved, the period of such grant, the name of the person, firm, corporation or association entitled to collect performance royalties earned in the foreign territory and the amount of such share. Within ten (10) days after the execution of this agreement Publisher agrees to submit to BMI, in writing, a list of all works as to which Publisher has, prior to the effective date of this agreement, granted to any person, firm, corporation or association performing rights and/or the right to collect publisher performance royalties earned in any foreign territory.

C. In the event that BMI transmits to Publisher performance royalties designated as the writer's share of performance royalties earned by any of the works in any foreign territory, Publisher shall promptly pay such royalties to the writer or writers of the works involved. If Publisher is unable for any reason to locate and make payment to any of the writers involved within six (6) months from the date of receipt, the amounts due such writers shall be returned to BMI.

FIFTEENTH:

A. Publisher agrees that Publisher, its agents, employees, representatives or affiliated companies, will not directly or indirectly during the term of this agreement:

(1) Solicit or accept payment from or on behalf of authors for composing music for lyrics, or from or on behalf of composers for writing lyrics to music.

(2) Solicit or accept manuscripts from composers or authors in consideration of any payments to be made by or on behalf of such composers or authors for reviewing, arranging, promotion, publication, recording or any other services connected with the exploitation of any composition.

(3) Permit Publisher's name, or the fact of its affiliation with BMI, to be used by any other person, firm, corporation or association engaged in any of the practices described in subparagraphs A(1) and A(2) of this paragraph FIFTEENTH.

(4) Submit to BMI, as one of the works to come within this agreement, any musical composition with respect to which any payments described in subparagraphs A(1) and A(2) of this paragraph FIFTEENTH have been made by or on behalf of a composer or author to any person, firm, corporation or association.

B. Publisher agrees that Publisher, its agents, employees or representatives will not directly or indirectly during the term of this agreement make any effort to ascertain from, or offer any inducement or consideration to, anyone, including but not limited to any broadcasting licensee of BMI or to the agents, employees or representatives of BMI or of any such licensee, for information regarding the time or times when any such BMI licensee is to report its performances to BMI, or to attempt in any way to manipulate performances or affect the representative character or accuracy of BMI's system of sampling or logging performances.

C. Publisher agrees to notify BMI promptly in writing (1) of any change of firm name or address of Publisher, and (2) of any change of twenty percent (20%) or more in the ownership thereof.

D. In the event of the violation of any of the provisions of subparagraphs A, B or C of this paragraph FIFTEENTH, BMI shall have the right, in its sole discretion, to terminate this agreement by giving Publisher at least thirty (30) days' notice by registered or certified mail. In the event of such termination, no payments shall be due to Publisher pursuant to paragraph SEVENTH hereof.

SIXTEENTH: All disputes of any kind, nature or description whatsoever arising in connection with the terms and conditions of this agreement, or arising out of the performance thereof, or based upon an alleged breach thereof, shall be submitted to arbitration in the City, County and State of New York under the then prevailing rules of the American Arbitration Association by an arbitrator or arbitrators to be selected as follows: Each of the parties hereto shall by written notice to the other have the right to appoint one arbitrator: provided, however, that if within ten (10) days following the giving of such notice by one party the other shall not by written notice appoint another arbitrator the first arbitrator appointed shall be the sole arbitrator. If two arbitrators are so appointed, they shall thereupon appoint the third arbitrator, provided that if ten (10) days shall elapse after the appointment of the second arbitrator and the said two arbitrators are unable to agree upon the appointment of the third arbitrator then either party may in writing request the American Arbitration Association to appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on the parties hereto and judgment may be, but need not be, entered thereon in any court having jurisdiction. Such award shall include the fixing of the cost of arbitration, which shall be borne by the unsuccessful party.

SEVENTEENTH: Publisher agrees that it shall not, without the written consent of BMI, assign any of its rights hereunder. No rights of any kind against BMI will be acquired by the assignee if any such purported assignment is made by Publisher without such written consent.

EIGHTEENTH: Any notice sent to Publisher pursuant to the terms of this agreement shall be valid if addressed to Publisher at the last address furnished by Publisher in writing to BMI's Department of Publisher Administration.

NINETEENTH: This agreement cannot be changed orally and shall be governed and construed pursuant to the laws of the State of New York.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed as of the day and year first above written.

BROADCAST MUSIC, INC.

By .....

.....

By .....

(Sign here)

E 582

CBS v. ASCAP

Plaintiffs' Exhibit No. 471B

BMI-Publisher Affiliation Agreement with a publisher canceling and superseding any prior agreement between the parties.

U. S. DIST. COURT
S. D. OF N. Y.
DEC 1973

E 583

471

AGREEMENT made this day of , 19 , between BROADCAST MUSIC, INC., a New York corporation, whose address is 40 West 57th Street, New York, N.Y. 10019 (hereinafter called "BMI") and .....

a corporation .....doing business under the firm name and style of.....whose address is .....

(Street or Avenue) (City) (State) (Zip)

(hereinafter called "Publisher").

WITNESSETH:

FIRST: The term of this agreement shall be the period of five (5) years from ..... to ....., and continuing thereafter for additional periods of five (5) years each unless terminated by either party at the end of such initial period, or any such additional five (5) year period, upon notice by registered or certified mail not more than six (6) months or less than three (3) months prior to the end of any such term.

SECOND: As used in this agreement, the word "works" shall mean:

A. All musical and dramatico-musical compositions, whether published or unpublished, now owned or copyrighted by Publisher or in which Publisher owns or controls performing rights, and

B. All musical and dramatico-musical compositions, whether published or unpublished, in which hereafter during the term Publisher acquires ownership or copyright or ownership or control of the performing rights, from and after the date of the acquisition by Publisher of such ownership or control.

THIRD: Publisher hereby sells, assigns and transfers to BMI, its successors or assigns, for the term of this agreement:

A. All the rights which Publisher owns or acquires publicly to perform, and to license others to perform, for profit or otherwise, anywhere in the world, any part or all of the works, such rights being granted exclusively to BMI except to the extent of any prior grant listed on clearance sheets or cue sheets submitted pursuant to subparagraph A of paragraph TENTH with respect to works heretofore acquired by Publisher.

B. The non-exclusive right to record, and to license others to record, any part or all of any of the works on electrical transcriptions, wire, tape, film or otherwise, but only for the purpose of performing such work publicly by means of radio and television or for archive or audition purposes and not for sale to the public or for synchronization with motion pictures intended primarily for theatrical exhibition or with programs distributed by means of syndication to broadcasting stations.

C. The non-exclusive right to adapt, arrange, change and dramatize any part or all of any of the works for performance purposes, and to license others to do so.

FOURTH:

A. The rights granted to BMI by subparagraph A of paragraph THIRD hereof shall not include the right to perform or license the performance of more than one song or aria from an opera, operetta or musical comedy or more than five (5) minutes from a ballet if such performance is accompanied by the dramatic action, costumes or scenery of that opera, operetta, musical comedy or ballet.

B. Publisher, together with all the writers and co-publishers, if any, of a work, shall have the right jointly, by written notice to BMI, to exclude from the grant made by subparagraph A of paragraph THIRD hereof performances of more than thirty (30) minutes' duration of a work which is an opera, operetta or musical comedy, but this right shall not apply to a work which is the score of a film originally produced for exhibition in motion picture theaters when performed as incorporated in such film, or which is a score originally written for a radio or television program when performed as incorporated in such program.

FIFTH:

A. As full consideration for all rights granted to BMI hereunder, BMI agrees to make the following payments to Publisher with respect to each of the works in which BMI has exclusive performing rights:

(1) For performances of works on broadcasting stations in the United States, its territories and possessions and Canada BMI will pay amounts calculated pursuant to BMI's then standard practices upon the basis of the then current performance rates generally paid by BMI to its affiliated publishers for similar performances of similar compositions. The number of performances for which Publisher shall be entitled to payment shall be estimated by BMI in accordance with its then current system of computing the number of such performances.

(2) For performances of works outside of the United States, its territories and possessions and Canada BMI will pay to Publisher all monies received by BMI in the United States from any performing rights licensing organization which are designated by such organization as the publisher's share of foreign performance royalties earned by any of the works after deduction of ten percent (10%) of the gross amount thereof to cover BMI's handling charge.

(3) In the case of works which, or rights in which, are owned by Publisher jointly with one or more other publishers who have granted performing rights therein to BMI, the sum payable to Publisher under this subparagraph A shall be a pro rata share determined on the basis of the number of publishers, unless BMI shall have received from Publisher a copy of an agreement or other document signed by all of the publishers, providing for a different division of payment.

B. Notwithstanding the foregoing provisions of this paragraph FIFTH, BMI shall have no obligation to make payment hereunder with respect to any performance of a work which occurs prior to the date on which BMI shall have received from Publisher all of the material with respect to such work referred to in subparagraphs A and D(1) of paragraph TENTH hereof, and in the case of foreign performances, the information referred to in subparagraph B of paragraph FOURTEENTH hereof.

SIXTH: BMI will furnish statements to Publisher at least twice during each year of the term showing the number of performances of the works as computed pursuant to subparagraph A(1) of paragraph FIFTH hereof, and at least once during each year of the term showing the monies received by BMI referred to in subparagraph A(2) of paragraph FIFTH hereof. Each such statement shall be accompanied by payment of the sum thereby shown to be due to Publisher, subject to all proper deductions, if any, for advances or amounts due to BMI from Publisher.

SEVENTH:

A. Nothing in this agreement requires BMI to continue to license the works subsequent to the termination of this agreement. In the event that BMI continues to license any or all of the works, however, BMI shall continue to make payments to Publisher for so long as Publisher does not make or purport to make directly or indirectly any grant of performing rights in such works to any other licensing organization. The amounts of such payments shall be calculated pursuant to BMI's then current standard practices upon the basis of the then current performance rates generally paid by BMI to its affiliated publishers for similar performances of similar compositions. Publisher agrees to notify BMI by registered or certified mail of any grant or purported grant by Publisher directly or indirectly of performing rights to any other performing rights organization within ten (10) days from the making of such grant or purported grant and if Published fails so to inform BMI thereof and BMI makes payments to Publisher for any period after the making of any such grant or purported grant, Publisher agrees to repay to BMI all amounts so paid by BMI promptly on demand. In addition, if BMI inquires of Publisher by registered or certified mail, addressed to Publisher's last known address, whether Publisher has made any such grant or purported grant and Publisher fails to confirm to BMI by registered or certified mail within thirty (30) days of the mailing of such inquiry that Publisher has not made any such grant or purported grant, BMI may, from and after such date, discontinue making any payments to Publisher. In the event that Publisher subsequently certifies to BMI by registered or certified mail that it has made no such grant or purported grant, BMI shall resume payments to Publisher commencing with the calendar quarter immediately following the giving of such notice by Publisher.

B. BMI's obligation to continue payment to Publisher after the termination of this agreement for performances outside of the United States, its territories and possessions and Canada shall be dependent upon BMI's receipt in the United States of payments designated by foreign performing rights licensing organizations as the publisher's share of foreign performance royalties earned by any of the works. Payment of such foreign royalties shall be subject to deduction of BMI's then current handling charge applicable to its affiliated publishers.

EIGHTH: In the event that this agreement shall terminate at a time when, after crediting all earnings reflected by the statements rendered to Publisher prior to the effective date of such termination, there is an indebtedness from Publisher to BMI, for advances or otherwise, such termination shall not be effective with respect to the works then embraced by this agreement until thirty (30) days after such indebtedness shall be paid by Publisher or until a statement is rendered by BMI at its normal accounting period showing that the amount of such indebtedness has been fully recouped by BMI.

NINTH:

A. BMI shall have the right, upon written notice to Publisher, to exclude from this agreement, at any time, any work which in its opinion (1) is similar to a previously existing composition and might constitute a copyright infringement, or (2) has a title or music or lyric similar to that of a previously existing composition and might lead to a claim of unfair competition, or (3) is offensive, in bad taste or against public morals, or (4) is not reasonably suitable for performance.

B. In the case of works which in the opinion of BMI are based on compositions in the public domain, BMI shall have the right, at any time, upon written notice to Publisher, either (1) to exclude any such work from this agreement, or (2) to classify any such work as entitled to receive only a stated fraction of the full credit that would otherwise be given for performances thereof.

C. In the event that any work is excluded from this agreement pursuant to subparagraph A or B of this paragraph NINTH, or pursuant to subparagraph C of paragraph TWELFTH hereof, all rights of BMI in such work shall automatically revert to Publisher ten (10) days after the date of the notice of such exclusion given by BMI to Publisher. In the event that a work is classified for less than full credit under subparagraph B(2) of this paragraph NINTH, Publisher shall have the right, by giving notice to BMI within ten (10) days after the date of BMI's notice to Publisher of the credit allocated to such work, to terminate all rights in such work granted to BMI herein and all such rights of BMI in such work shall revert to Publisher thirty (30) days after the date of such notice from Publisher to BMI.

TENTH:

A. With respect to each of the works which has been or shall be published or recorded commercially or synchronized with motion picture or television film or tape or which Publisher considers likely to be performed, Publisher agrees to furnish to BMI:

(1) Two copies of a completed clearance sheet in the form supplied by BMI, unless a cue sheet with respect to such work is furnished pursuant to subparagraph A(3) of this paragraph TENTH.

(2) A legible lead sheet or other written or printed copy of such work setting forth the lyrics, if any, and music correctly metered; provided that with respect to a work used solely as background music, such copy need be furnished only if requested by BMI.

(3) If such work has been or shall be synchronized with or otherwise used in connection with motion picture or television film or tape, a cue sheet showing the title, composers, publisher and nature and duration of the use of the work in such film or tape.

B. Publisher shall submit the material described in subparagraph A of this paragraph TENTH with respect to works heretofore published, recorded or synchronized within ten (10) days after the execution of this agreement and with respect to any of the works hereafter so published, recorded, synchronized or likely to be performed prior to the date of publication or release of the recording, film or tape or anticipated performance.

C. The submission of each clearance sheet or cue sheet shall constitute a warranty by Publisher that all of the information contained thereon is true and correct and that no performing rights in any of the works listed thereon has been granted to or reserved by others except as specifically set forth therein.

D. Publisher agrees:

(1) To submit to BMI, from time to time, so far as known to Publisher, the manufacturers' names, catalog numbers and the names of the recording artists with respect to all phonograph records, tapes, electrical transcriptions and other reproductions made of any of the works.

(2) To secure and maintain copyright protection of the works pursuant to the Copyright Law of the United States and pursuant to the laws of such other nations of the world where such protection is afforded; and to give BMI prompt written notice of the date and number of copyright registration and/or renewal of each work registered in the United States Copyright Office.

(3) To obtain and deliver to BMI any written agreements, assignments, instruments or documents of any kind with respect to any of the works which BMI may reasonably require.

ELEVENTH: Publisher warrants and represents that:

A. Publisher has the right to enter into this agreement; Publisher is not bound by any prior commitments which conflict with its undertakings herein; the rights granted by Publisher to BMI herein are the sole and exclusive property of Publisher and are free from all encumbrances and claims; and exercise of such rights will not constitute infringement of copyright or violation of any right of, or unfair competition with, any person, firm, corporation or association.

B. Except with respect to works in which the possession of performing rights by another person, firm, corporation or association is specifically set forth on a clearance sheet or cue sheet submitted to BMI pursuant to subparagraph A of paragraph TENTH hereof, Publisher has exclusive performing rights in each of the works by virtue of written grants thereof to Publisher signed by all the authors and composers or other owners of such work.

TWELFTH:

A. Publisher agrees to defend, indemnify, save and hold BMI, its licensees, the advertisers of its licensees and their respective agents, servants and employees, free and harmless from and against any and all demands, loss, damage, suits, judgments, recoveries and costs, including counsel fees, resulting from any claim of whatever nature arising from or in connection with the exercise of any of the rights granted by Publisher in this agreement; provided, however, that the obligations of Publisher under this paragraph TWELFTH shall not apply to any matter added to, or changes made in, any work by BMI or its licensees.

B. Upon the receipt by any of the parties herein indemnified of any notice, demand, process, papers, writ or pleading, by which any such claim, demand, suit or proceeding is made or commenced against them, or any of them, which Publisher shall be obliged to defend hereunder, BMI shall, as soon as may be practicable, give Publisher notice thereof and deliver to Publisher such papers or true copies thereof, and BMI shall have the right to participate by counsel of its own choice, at its own expense. Publisher agrees to cooperate with BMI in all such matters.

C. In the event of such notification of claim or service of process on any of the parties herein indemnified, BMI shall have the right, from the date thereof, to exclude the work with respect to which a claim is made from this agreement and/or to withhold payment of all sums which may become due pursuant to this agreement or any modification thereof until such claim has been withdrawn, settled or adjudicated.

THIRTEENTH: Publisher makes, constitutes and appoints BMI, or its nominee, Publisher's true and lawful attorney, irrevocably during the term hereof, in the name of BMI or that of its nominee, or in Publisher's name, or otherwise, to do all acts, take all proceedings, and execute, acknowledge and deliver any and all instruments, papers, documents, process or pleadings that may be necessary, proper or expedient to restrain infringement of and/or to enforce and protect the rights granted by Publisher hereunder, and to recover damages in respect of or for the infringement or other violation of the said rights, and in BMI's sole judgment to join Publisher and/or others in whose names the copyrights to any of the works may stand, and to discontinue, compromise or refer to arbitration, any such actions or proceedings or to make any other disposition of the disputes in relation to the works; provided that any action or proceeding commenced by BMI pursuant to the provisions of this paragraph THIRTEENTH shall be at its sole expense and for its sole benefit.

FOURTEENTH:

A. It is acknowledged that BMI has heretofore entered into, and may during the term of this agreement enter into, contracts with performing rights licensing organizations for the licensing of public performing rights controlled by BMI in territories outside of the United States, its territories and possessions and Canada, (hereinafter called "foreign territories"). Upon Publisher's written request, BMI agrees to permit Publisher to grant performing rights in any or all of the works for any foreign territory for which, at the time such request is received, BMI has not entered into any such contract with a performing rights licensing organization; provided, however, that any such grant of performing rights by Publisher shall terminate at such time when BMI shall have entered into such a contract with a performing rights licensing organization covering such foreign territory and shall have notified Publisher thereof. Nothing herein contained, however, shall be deemed to restrict Publisher from assigning to its foreign publisher or representative the right to collect a part or all of the publishers' performance royalties earned by any or all of the works in any foreign territory as part of an agreement for the publication, exploitation or representation of such works in such territory, whether or not BMI has entered into such a contract with a performing rights licensing organization covering such territory.

B. Publisher agrees to notify BMI promptly in writing in each instance when publication, exploitation or other rights in any or all of the works are granted for any foreign territory. Such notice shall set forth the title of the work, the country or countries involved, the period of such grant, the name of the person, firm, corporation or association entitled to collect performance royalties earned in the foreign territory and the amount of such share. Within ten (10) days after the execution of this agreement Publisher agrees to submit to BMI, in writing, a list of all works as to which Publisher has, prior to the effective date of this agreement, granted to any person, firm, corporation or association performing rights and/or the right to collect publisher performance royalties earned in any foreign territory.

C. In the event that BMI transmits to Publisher performance royalties designated as the writer's share of performance royalties earned by any of the works in any foreign territory, Publisher shall promptly pay such royalties to the writer or writers of the works involved. If Publisher is unable for any reason to locate and make payment to any of the writers involved within six (6) months from the date of receipt, the amounts due such writers shall be returned to BMI.

FIFTEENTH:

A. Publisher agrees that Publisher, its agents, employees, representatives or affiliated companies, will not directly or indirectly during the term of this agreement:

(1) Solicit or accept payment from or on behalf of authors for composing music for lyrics, or from or on behalf of composers for writing lyrics to music.

(2) Solicit or accept manuscripts from composers or authors in consideration of any payments to be made by or on behalf of such composers or authors for reviewing, arranging, promotion, publication, recording or any other services connected with the exploitation of any composition.

(3) Permit Publisher's name, or the fact of its affiliation with BMI, to be used by any other person, firm, corporation or association engaged in any of the practices described in subparagraphs A(1) and A(2) of this paragraph FIFTEENTH.

(4) Submit to BMI, as one of the works to come within this agreement, any musical composition with respect to which any payments described in subparagraphs A(1) and A(2) of this paragraph FIFTEENTH have been made by or on behalf of a composer or author to any person, firm, corporation or association.

B. Publisher agrees that Publisher, its agents, employees or representatives will not directly or indirectly during the term of this agreement make any effort to ascertain from, or offer any inducement or consideration to, anyone, including but not limited to any broadcasting licensee of BMI or to the agents, employees or representatives of BMI or of any such licensee, for information regarding the time or times when any such BMI licensee is to report its performances to BMI, or to attempt in any way to manipulate performances or affect the representative character or accuracy of BMI's system of sampling or logging performances.

C. Publisher agrees to notify BMI promptly in writing (1) of any change of firm name or address of Publisher, and (2) of any change of twenty percent (20%) or more in the ownership thereof.

D. In the event of the violation of any of the provisions of subparagraphs A, B or C of this paragraph FIFTEENTH, BMI shall have the right, in its sole discretion, to terminate this agreement by giving Publisher at least thirty (30) days' notice by registered or certified mail. In the event of such termination, no payments shall be due to Publisher pursuant to paragraph SEVENTH hereof.

SIXTEENTH: All disputes of any kind, nature or description whatsoever arising in connection with the terms and conditions of this agreement, or arising out of the performance thereof, or based upon an alleged breach thereof, shall be submitted to arbitration in the City, County and State of New York under the then prevailing rules of the American Arbitration Association by an arbitrator or arbitrators to be selected as follows: Each of the parties hereto shall by written notice to the other have the right to appoint one arbitrator; provided, however, that if within ten (10) days following the giving of such notice by one party the other shall not by written notice appoint another arbitrator the first arbitrator appointed shall be the sole arbitrator. If two arbitrators are so appointed, they shall thereupon appoint the third arbitrator, provided that if ten (10) days shall elapse after the appointment of the second arbitrator and the said two arbitrators are unable to agree upon the appointment of the third arbitrator then either party may in writing request the American Arbitration Association to appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on the parties hereto and judgment may be, but need not be, entered thereon in any court having jurisdiction. Such award shall include the fixing of the cost of arbitration, which shall be borne by the unsuccessful party.

SEVENTEENTH: Publisher agrees that it shall not, without the written consent of BMI, assign any of its rights hereunder. No rights of any kind against BMI will be acquired by the assignee if any such purported assignment is made by Publisher without such written consent.

EIGHTEENTH: Any notice sent to Publisher pursuant to the terms of this agreement shall be valid if addressed to Publisher at the last address furnished by Publisher in writing to BMI's Department of Publisher Administration.

NINETEENTH: This agreement cannot be changed orally and shall be governed and construed pursuant to the laws of the State of New York.

TWENTIETH: This agreement, as of its effective date, cancels and supersedes the agreement between the parties dated _____ and all modifications thereof (herein called the "Superseded Agreement"). All works embraced by the Superseded Agreement shall be deemed embraced by this agreement.

It is agreed that any part of any advances heretofore made to Publisher pursuant to the Superseded Agreement which shall not have been recouped by performances of works up to the effective date of this agreement shall be deemed to be an advance against all monies which may become payable to Publisher pursuant to this agreement and any extensions, renewals or modifications thereof, or substitutions therefor, for performances of the works in the United States and Canada.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed as of the day and year first above written.

BROADCAST MUSIC, INC.

By _____

_____

By _____
(Sign here)

E 587

CBS v. ASCAP

Plaintiffs' Exhibit No. 472

Current form of BMI Writer Affiliation Agreement.

E 588

BROADCAST MUSIC, INC.

40 West 57th Street New York, N. Y. 10019

Date

Dear

The following shall constitute the agreement between us:

1. As used in this agreement:

(a) The word "period" shall mean the term of two years from

to , and continuing thereafter for additional terms of two years each unless terminated by either party at the end of said initial term or any additional term, upon notice by registered or certified mail not more than six months or less than sixty (60) days prior to the end of any such term.

(b) The word "works" shall mean:

(i) All musical and dramatico-musical compositions composed by you alone or with one or more collaborators during the period; and

(ii) All musical and dramatico-musical compositions composed by you alone or with one or more collaborators prior to the period, except those in which there is an outstanding grant of the right of public performance to a person other than a publisher affiliated with BMI.

2. You agree that:

(a) Within ten (10) days after the execution of this agreement you will furnish to us a copy of each work heretofore composed by you which has been published in printed copies or recorded commercially or which is being currently performed or which you consider as likely to be performed, together with two copies of a completed clearance sheet in the form supplied by BMI with respect to each such work.

(b) In each instance that a work not submitted to us pursuant to sub-paragraph (a) hereof is published in printed copies or recorded commercially or in synchronization with film or tape or is considered by you as likely to be performed, whether such work is composed prior to the execution of this agreement or hereafter during the period, you will promptly furnish to us a copy of the work together with two copies of a completed clearance sheet in the form supplied by BMI with respect to each such work.

3. The submission of clearance sheets pursuant to paragraph 2 hereof shall constitute a warranty by you that all of the information contained thereon is true and correct and that no performing rights in such work have been granted to or reserved by others except as specifically set forth therein in connection with works heretofore written or co-written by you.

4. You hereby grant to us for the period:

(a) All the rights that you own or acquire publicly to perform, and to license others to perform, for profit or otherwise, anywhere in the world, any part or all of the works, such rights being granted exclusively to us except to the extent of any prior grants listed on clearance sheets submitted with respect to works heretofore written or co-written by you.

(b) The non-exclusive right to record, and to license others to record, any part or all of any of the works on electrical transcriptions, wire, tape, film or otherwise, but only for the purpose of performing such work publicly by means of radio and television or for archive or audition purposes and not for sale to the public or for sychronization with motion pictures intended primarily for theatrical exhibition or with programs distributed by means of syndication to broadcasting stations.

(c) The non-exclusive right to adapt, arrange, change and dramatize any part or all of any of the works for performance purposes, and to license others to do so.

5. (a) The rights granted to us by sub-paragraph (a) of paragraph 4 hereof shall not include the right to perform or license the performance of more than one song or aria from an opera, operetta, or musical comedy or more than five minutes from a ballet if such performance is accompanied by the dramatic action, costumes or scenery of that opera, operetta, musical comedy or ballet.

(b) You, together with the publisher and your collaborators, if any, shall have the right jointly, by written notice to us, to exclude from the grant made by sub-paragraph (a) of paragraph 4 hereof performances of more than thirty (30) minutes' duration of a work which is an opera, operetta or musical comedy, but this right shall not apply to a work which is the score of a film originally written for exhibition in motion picture theaters when performed as incorporated in such film, or which is a score originally written for a radio or television program when performed as incorporated in such program.

6. (a) As full consideration for all rights granted to us hereunder, we agree to pay to you, with respect to each of the works in which we obtain and retain exclusive performing rights during the period:

(i) For performances of a work on broadcasting stations in the United States, it territories and possessions and Canada, amounts calculated pursuant to our then current standard practices upon the basis of the then current performance rates generally paid by us to our affiliated writers for similar performances of similar compositions. The number of performances for which you shall be entitled to payment shall be estimated by us in accordance with our then current system of computing the number of such performances.

(ii) All monies received by us from any performing rights licensing organization outside of the United States, its territories and possessions and Canada, which are designated by such performing rights licensing organization as the author's share of foreign performance royalties earned by your works after the deduction of ten percent (10%) of the gross amount thereof to cover our handling charge.

(b) In the case of a work composed by you with one or more collaborators, the sum payable to you hereunder shall be a pro rata share, determined on the basis of the number of collaborators, unless you shall have transmitted to us a copy of an agreement between you and your collaborators, providing for a different division of payment.

(c) We shall have no obligation to make payment hereunder with respect to (i) any performance of a work which occurs prior to the date on which we have received from you all of the information and material with respect to such work which is referred to in paragraph 2 or 3 hereof, or (ii) any performance of a work for which you receive payment of performance royalties from the publisher thereof. You waive the right to receive performance royalties from the publisher of any work with respect to any and all performances thereof for which you receive payment from us hereunder.

7. We will furnish statements to you at least twice during each year of the period showing the number of performances as computed pursuant to sub-paragraph (a) (i) of paragraph 6 hereof and at least once during each year of the period showing the monies due pursuant to sub-paragraph (a) (ii) of paragraph 6 hereof. Each statement shall be accompanied by payment to you, subject to all proper deductions for advances, if any, of the sum thereby shown to be due for such performances.

8. (a) Nothing in this agreement requires us to continue to license the works subsequent to the termination of this agreement. In the event that we continue to license any or all of the works, however, we shall continue to make payments to you for so long as you do not make or purport to make directly or indirectly any grant of performing rights in such works to any other licensing organization. The amounts of such payments shall be calculated pursuant to our then current standard practices upon the basis of the then current performance rates generally paid by us to our affiliated writers for similar performances of similar compositions. You agree to notify us by registered or certified mail of any grant or purported grant by you directly or indirectly of performing rights to any other performing rights organization within ten (10) days from the making of such grant or purported grant and if you fail so to inform us thereof and we make payments to you for any period after the making of any such grant or purported grant, you agree to repay to us all amounts so paid by us promptly on demand. In addition, if we inquire of you by registered or certified mail, addressed to your last known address, whether you have made any such grant or purported grant and you fail to confirm to us by registered or certified mail within thirty (30) days of the mailing of such inquiry that you have not made any such grant or purported grant, we may, from and after such date, discontinue making any payments to you. In the event that you subsequently certify to us by registered or certified mail that you have made no such grant or purported grant, we shall resume payments to you commencing with the calendar quarter immediately following the giving of such notice by you.

(b) Our obligation to continue payment to you after the termination of this agreement for performances outside of the United States, its territories and possessions and Canada shall be dependent upon our receipt in the United States of payments designated by foreign performing rights organizations as the author's share of foreign performance royalties earned by your works. Payment of such foreign royalties shall be subject to deduction of our then current handling charge applicable to our affiliated writers.

9. In the event that you terminate this agreement pursuant to sub-paragraph (a) of paragraph 1 hereof at time when, after crediting all earnings reflected by the statements rendered to you prior to the effective date of such termination, there remains an unearned balance of advances made to you by us, such termination shall not be effective with respect to the works then embraced by this agreement unless and until thirty (30) days after the unpaid balance of advances shall be repaid by you or until a statement is rendered by us at our normal accounting period showing that such unearned balance of advances has been fully recouped by us.

10. You warrant and represent that you have the right to enter into this agreement; that you are not bound by any prior commitments which conflict with your commitments hereunder; that each of the works, composed by you alone or with one or more collaborators, is original; and that exercise of the rights granted by you herein will not constitute an infringement of copyright or violation of any other right of, or unfair competition with, any person, firm or corporation. You agree to indemnify and hold harmless us and our licensees from and against any and all loss or damage resulting from any claim of whatever nature arising from or in connection with the exercise of any of the rights granted by you in this agreement. Upon notification to us or any of our licensees of a claim with respect to any of the works, we shall have the right to exclude such work from this agreement and/or to withhold payment of all sums which become due pursuant to this agreement or any modification thereof until such claim has been withdrawn, settled or adjudicated.

11. (a) We shall have the right, upon written notice to you, to exclude from this agreement, at any time, any work which in our opinion (i) is similar to a previously existing composition and might constitute a copyright infringement, or (ii) has a title or music or lyric similar to that of a previously existing composition and might lead to a claim of unfair competition, or (iii) is offensive, in bad taste or against public morals, or (iv) is not reasonably suitable for performance.

(b) In the case of works which in our opinion are based on compositions in the public domain, we shall have the right, upon written notice to you, either (i) to exclude any such work from this agreement, or (ii) to classify any such work as entitled to receive only a fraction of the full credit that would otherwise be given for performances thereof.

(c) In the event that any work is excluded from this agreement pursuant to paragraph 10 or sub-paragraph (a) or (b) of this paragraph 11, all rights in such work shall automatically revert to you ten (10) days after the date of our notice to you of such exclusion. In the event that a work is classified for less than full credit under sub-paragraph (b) (ii) of this paragraph 11, you shall have the right, by giving notice to us, within ten (10) days after the date of our letter advising you of the credit allocated to the work, to terminate our rights therein, and all rights in such work shall thereupon revert to you.

12. In each instance that you write, or are employed or commissioned by a motion picture producer to write, during the period, all or part of the score of a motion picture intended primarily for exhibition in theaters, or by the producer of a dramatico-musical work or revue for the legitimate stage to write, during the period, all or part of the musical compositions contained therein, we agree to advise the producer of the film that such part of the score as is written by you may be performed as part of the exhibition of said film in theaters in the United States, its territories and possessions, without compensation to us, or to the producer of the dramatico-musical work or revue that your compositions embodied therein may be performed on the stage with living artists as part of such dramatico-musical work or revue, without compensation to us. In the event that we notify you that we have established a system for the collection of royalties for performance of the scores of motion picture films in theaters in the United States, its territories and possessions, we shall no longer be obligated to take such action with respect to motion picture scores.

13. You make, constitute and appoint us, or our nominee, your true and lawful attorney, irrevocably during the term hereof, in our name or that of our nominee, or in your name, or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process or pleadings that may be necessary, proper or expedient to restrain infringement of and/or to enforce and protect the rights granted by you hereunder, and to recover damages in respect to or for the infringement or other violation of the said rights, and in our sole judgment to join you and/or others in whose names the copyrights to any of the works may stand; to discontinue, compromise or refer to arbitration, any such actions or proceedings or to make any other disposition of the disputes in relation to the works, provided that any action or proceeding commenced by us pursuant to the provisions of this paragraph shall be at our sole expense and for our sole benefit.

14. You agree that you, your agents, employees or representatives will not, directly or indirectly, solicit or accept payment from writers for composing music for lyrics or writing lyrics to music or for reviewing, publishing, promoting, recording or rendering other services connected with the exploitation of any composition, or permit use of your name or your affiliation with us in connection with any of the foregoing. In the event of a violation of any of the provisions of this paragraph 14, we shall have the right, in our sole discretion, by giving you at least thirty (30) days' notice by registered or certified mail, to terminate this agreement. In the event of such termination no payments shall be due to you pursuant to paragraph 8 hereof.

15. No monies due or to become due to you shall be assignable, whether by way of assignment, sale or power granted to an attorney-in-fact, without our prior written consent. If any assignment of such monies is made by you without such prior written consent, no rights of any kind against us will be acquired by the assignee, purchaser or attorney-in-fact.

16. All disputes of any kind, nature or description whatsoever arising in connection with the terms and conditions of this agreement, or arising out of the performance thereof, or based upon an alleged breach thereof, shall be submitted to arbitration in the City, County and State of New York under the then prevailing rules of the American Arbitration Association by an arbitrator or arbitrators to be selected as follows: Each of us shall by written notice to the other have the right to appoint one arbitrator, provided, however, that if within ten (10) days following the giving of such notice by one of us the other shall not by written notice appoint another arbitrator the first arbitrator appointed shall be the sole arbitrator. If two arbitrators are so appointed, they shall thereupon appoint the third arbitrator, provided that if ten (10) days shall elapse after the appointment of the second arbitrator and the said two arbitrators are unable to agree upon the appointment of the third arbitrator then either of us may, in writing, request the American Arbitration Association to appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on us and judgment may be, but need not be, entered thereon in any court having jurisdiction. Such award shall include the fixing of the cost of arbitration, which shall be borne by the unsuccessful party.

17. Any notice sent to you pursuant to the terms of this agreement shall be valid if addressed to you at the last address furnished by you in writing to our Department of Writer Administration.

18. This agreement cannot be changed orally and shall be governed and construed pursuant to the laws of the State of New York.

Very truly yours,

BROADCAST MUSIC, INC.

ACCEPTED AND AGREED TO:

By .....

.....

E 592

CBS v. ASCAP

Plaintiffs' Exhibit No. 513

Affidavit of Edward M. Cramer, in this action, dated 10/21/70.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

COLUMBIA BROADCASTING SYSTEM, INC., :

Plaintiff, :

-against- : 69 Civ. 5740

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., : REBUTTAL AFFIDAVIT

Defendants. :

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

EDWARD M. CRAMER, being duly sworn, deposes and says:

1. I am the President of defendant Broadcast Music, Inc. ("BMI"), am a member of the Bar of this Court, and am familiar with the facts and proceedings herein. I make this rebuttal affidavit in response to the October 15, 1970 affidavit of Donald Sipes, Vice President of Business Affairs and Planning for plaintiff Columbia Broadcasting System, Inc.'s ("CBS") Television Network ("CTN").

Amounts Paid by CTN to BMI

2. With respect to the royalties paid by CTN to BMI, CBS has supplied figures for six years rather than the three years requested by the Court, stating that the 1967 through 1969 figures are not significant enough to establish a "trend" (Sipes Aff. ¶ 9). These amounts were paid pursuant to the 1954 CBS-BMI agreement calling for a royalty rate of 1.09% of CTN's net receipts from advertisers after deductions and the dollar amounts therefore have nothing to do with any trend of music usage, but reflect only the amount of CTN's

net revenues and accounting procedures during those years. Since the very heart of CBS' claim in this action is that payments should be based on CTN's use of music and not based on its revenues, the past payment figures have no significance whatever.

CBS' Counterproposal

3. The absurdity of CBS' estimate of BMI's administrative expenses with respect to CTN (two $7,500 per year employees to check the CTN Logs (see Sipes Aff. ¶ 6)) is apparent on its face - if only in light of the cost of countless abortive negotiating sessions with CBS!

4. In opposing CBS' counterproposal, as both unworkable and unfair, BMI has made the point, inter alia, that the CBS proposal did not take into account the bonuses paid by BMI, and that because of the complexity of the bonus system it would be impossible to predict for any given year the number and amounts of bonuses which would be generated by that year's music usage by a particular user (see Cramer Reply Aff. ¶¶ 18-22, sworn to July 9, 1970; Adler Supplemental Aff. ¶¶ 2-3, sworn to July 15, 1970). Among the principal complicating factors are that: (1) a bonus is paid on the basis of overall earnings of an affiliate rather than earnings of particular compositions, and most affiliates have several compositions to their credit; (2) the bonus can be earned over a period as long as three years; and (3) the bonus relates to overall earnings rather than to earnings with respect to just one particular user.

5. CBS seeks to minimize the amount of bonus payments which would be "allocable" to CTN by stating that CTN's use of feature music is relatively low compared to the uses of feature music "by the thousands of radio stations

throughout the country" and that performances by those stations are the primary producers of bonus earnings (Sipes Aff. ¶ 7). This argument is misleading because it ignores the nature of both the television network and its normal programming.

(a) First, it must be recognized that each CTN performance is carried by approximately 200 individual television stations. A radio station would have to play a song 200 times to match one performance on CTN.

(b) Moreover, the great preponderance of the feature songs selected for use on CTN are songs which have become very popular on radio, or are likely to become popular because their composers have produced other extremely popular songs. These performances on CTN are therefore often instrumental in generating substantial bonus payments. In contrast, between 80% and 90% of those "thousands of radio stations" referred to by CBS play songs which are out of the popular mainstream, and which are therefore less likely than the "hit" songs to generate bonuses. Therefore, the mere number of feature uses by a particular user does not reflect the number or amount of bonuses thereby generated.

The Weighting of Music Uses

6. CBS' October 15, 1970 affidavit again makes it clear that CBS quarrels not with BMI's calculation of individual percentages for each category of music use (feature, theme and background), but only with the fact that BMI's calculation of an overall percentage weighted the three music use categories equally (see Sipes Aff. ¶ 10).

It is obvious, however, that there is no conceivable weighting of these percentages which would justify an award as low as any figure suggested by CBS. Even if only the lowest percentage figure calculated for any category (50.9% for Feature) were used, and no weight given to the other uses, BMI should be paid 50.9% of the amount CTN is paying ASCAP, or $2,198,880.

7. Moreover, no reasonable person could argue that any one category of use should be the sole measure to the exclusion of consideration of the other categories, and indeed, CBS has revealed valuable information from which to assign weights to the feature, theme and background categories according to CBS' own estimates of CTN use:

(a) Paragraph 10 of the October 15 CBS affidavit states that "approximately 15%" of the BMI music used by CTN is theme music. We will therefore give theme music a weight of 15. The remaining 85% of BMI music used on CTN is some combination of feature and background. If feature were given a weight of 85 and background given no weight, the overall BMI percentage would be 57.25%. If background were given a weight of 85 and feature given no weight, the overall BMI percentage would be 63.45%. Therefore, according to CBS' use estimates, the overall BMI percentage would be somewhere between 57.25% and 63.45%.

(b) The October 15 CBS affidavit also tacitly suggests the appropriate point between these two parameters: Paragraph 7 states that "* * * approximately one fifth of CTN music usage

in minutes consists of feature performances * * *." Assuming that one-fifth figure to be applicable to CTN's use of BMI music, it would mean that the three categories should be weighted:

Feature	20 (x 50.9%)
Theme	15 (x 93.2%)
Background	65 (x 58.2%)
	100

with a resulting overall BMI percentage of 61.99%. Surely if the per-category percentages are weighted according to CTN's usage, CBS should have no objection.

Conclusion

8. Notwithstanding any argument CBS can raise, the fact remains that CBS has voluntarily agreed to pay ASCAP at a flat rate amounting to $4.32 million a year. This is the only objective manifestation of CBS' judgment as to what music is worth - without any attendant rights to a per-use license or a reduction in rate in the event CBS obtains a license directly from any ASCAP member. On the basis of CBS' own estimates as to the nature of CTN's music usage CTN uses at least 61.99% as much BMI music as ASCAP music. Objectively, therefore, the amount to be paid by CTN to BMI should be at least 61.99% of $4.32 million, or $2,677,968.

WHEREFORE, BMI respectfully prays that CBS be required to pay BMI between 61.99% and 70% as much as it pays ASCAP during the pendency of this action.

Edward M. Cramer

Edward M. Cramer

Sworn to before me this
21st day of October, 1970.

Notary Public

E 598

CBS v. ASCAP

Plaintiffs' Exhibit No. 517

Memorandum of defendants ASCAP, et al. (by Paul Weiss), dated 11/10/7[illegible], in this action.

E 599

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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COLUMBIA BROADCASTING SYSTEM, INC., :

Plaintiff, :

-against- : (M. E. L.)

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., : 69 Civ. 5740

Defendants. :

----------x

MEMORANDUM OF DEFENDANTS ASCAP, ET AL.

1971 NOV 10 PM 5:13

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,	:	
-against-	:	(M. E. L.)
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., Defendants.	:	69 Civ. 5740

MEMORANDUM OF DEFENDANTS ASCAP, ET AL.

We submit this memorandum in reply to CBS's supplemental memorandum dealing with ASCAP's motion for summary judgment and its motion for a stay or limitation of discovery.

a. Summary Judgment Motion.

To the extent that CBS's supplemental memorandum repeats or restates at great length the contentions previously made in connection with ASCAP's summary judgment motion, we do not believe that any reply is necessary. Our moving papers and oral argument, we suggest, dealt with and refuted all of those contentions.

We note, however, that CBS has now conceded there are no issues of fact which would preclude the granting of

ASCAP's motion. CBS says, in other words, that ASCAP's motion should be denied not because there are issues of fact which require a trial before the complaint can be dismissed, but because ASCAP's legal arguments are unsound (arguments which are, incidentally, misstated in CBS's memorandum*).

We also note that CBS is in error when it states that we made no evidentiary showing in our motion papers. Even a casual glance at those papers reveals that we presented the Court with a great deal of factual information. All of our factual assertions, moreover, were incontrovertible or were based on public records on file in this Court (a matter CBS now appears to concede).**

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*It is not our position, as CBS claims, that the 1950 Amended Final Judgment "disinfects" ASCAP in the sense that no one has standing to sue ASCAP under the antitrust laws. It is our position that the 1950 Amended Final Judgment is one of the undisputed facts of life, and that on those undisputed facts, ASCAP is not guilty of tying, price-fixing, boycotting, or any of the other shibboleths which CBS incants.

**CBS asserts that, for purposes of the motion, "the factual allegations of the complaint must be accepted as true"; it claims also that our motion is really for judgment on the pleadings. Neither assertion is tenable. The simple truth is that CBS was unable to come forward with any issue of fact which would require a trial and, hence, the only issue presented by ASCAP's motion is an issue of law. Obviously, if the Court agrees with our legal arguments, summary judgment should be granted. Summary judgment may not be denied to ASCAP because CBS says it has issues of fact to try on its legal theory and, therefore, does not seek summary judgment.

We shall show presently, moreover, that even on CBS's legal theory, there are no genuine issues of fact.

b. Staying or Limiting Discovery.

CBS argues that discovery should go forward while the summary judgment motion is pending because ASCAP's legal theory on the motion

> "is so palpably unsound that it should not be allowed to delay discovery until the writing of a formal opinion rejecting it" (CBS Supp. Mem., p.5).

There are two short answers to CBS's argument:

1. CBS's ipse dixit does not sweep the day. This Court has noted that our motion is a serious one and raises substantial questions.

Accordingly, the Court should exercise its discretion by staying all discovery against ASCAP until the motion for summary judgment is decided, particularly when the only party that even alleges it will be prejudiced by such delay is BMI--not a party to the motion and a party which, by virtue of stipulation with CBS, is to be exempted from CBS's discovery efforts.

There is no sound reason why ASCAP, its members and its counsel should be required to go through the bother and expense of protracted discovery procedures which may turn out to be totally unnecessary.

2. CBS's own recitation of the factual issues that it says will have to be tried in this action (if the summary judgment motion is denied) demonstrates the narrow scope of those issues, if indeed they be issues of fact at all.

For example, one broad area referred to by CBS as an area for discovery is

> "ASCAP's general policy of refusing to license on any basis other than blanket or per-program terms."

It is difficult to comprehend from this statement what CBS proposes to discover, or why CBS needs any discovery in this area at all.

The undisputed facts are that, under the Amended Final Judgment, ASCAP is required to grant a per program license to broadcasters and may grant a blanket license if the user so desires. Those are the two forms of licenses available. ASCAP itself does not offer any other form of license to broadcasters; of course, members and users may agree on any other form of license.

The consequences flowing from the fact that the blanket and per-program licenses are the only forms of license ASCAP offers are issues of law--not issues of fact that require any discovery.

For another example, CBS says that it needs discovery about "inaccessible" and "accessible" music. Again, it is difficult to comprehend what such discovery would reveal. It is not a matter of serious dispute that, if CBS, as a user of music in bulk, had to obtain individual licenses from ASCAP members to satisfy all of its needs for music, that would be a time-consuming, difficult and expensive procedure and might even in some cases for various reasons be impossible. That is precisely one reason why a licensing organization such as ASCAP exists and that is precisely why CBS wants it to continue to exist (even though the logical conclusion to be deduced from CBS's claims of antitrust violations is that ASCAP should be dismembered).

Why does CBS need discovery to learn what everybody already knows--some ASCAP music, to use CBS's characterization, is "inaccessible" and some is "accessible."

CBS says it needs discovery about an alleged

> "ASCAP policy of discouraging members from licensing users directly."

Since, on the record here, CBS has never sought individual licenses from ASCAP members, that alleged policy surely is not an appropriate area for discovery in this action. This is a private antitrust proceeding where CBS is limited to an

assertion of its own rights--not the rights of some third person.

In short, even by CBS's own assertions, there is no cause for granting it the unrestricted right to go fishing around in ASCAP's waters, at great expense to ASCAP, when the only result of that fishing expedition would be to discover facts which are either undisputed or irrelevant.

Indeed, if CBS were to formulate an objective statement of the facts it seeks to prove at a trial, we respectfully submit that the parties could probably stipulate to most or all of the relevant facts. That would certainly be a more desirable procedure than the unlimited discovery CBS now seeks.

CONCLUSION

For the reasons recited herein and in our other papers, ASCAP's motions should be granted.

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10022

Herman Finkelstein, Esq.
One Lincoln Plaza
New York, New York

Attorneys for Defendants ASCAP, et al.

Simon H. Rifkind
Jay H. Topkis
Allan Blumstein
Max Gitter Of Counsel

November 10, 1971

CBS v. ASCAP

Plaintiffs' Exhibit No. 567

Excerpts from Statement of Herman Finkelstein, General Attorney for ASCAP on Hearing Before Special Subcommittee of the Judiciary Committee of the House of Representatives in Connection with its Study of the Anti-Trust Laws, September 18, 1956.

STATEMENT OF HERMAN FINKELSTEIN
GENERAL ATTORNEY FOR ASCAP
ON HEARING BEFORE SPECIAL SUBCOMMITTEE
OF THE JUDICIARY COMMITTEE OF THE
HOUSE OF REPRESENTATIVES IN CONNECTION
WITH ITS STUDY OF THE ANTI-TRUST LAWS

September 18, 1956

Mr. Pierce [Counsel for Committee]. Mr. Finkelstein, will you give your name and occupation for the record?

Mr. Finkelstein. Herman Finkelstein, lawyer. General attorney for ASCAP, residing in New York at 440 East 56th Street.

Mr. Pierce. Mr. Finkelstein, you appear before this Committee in response to a subpoena; is that correct?

Mr. Finkelstein. I do, sir.

Mr. Pierce. How long have you held the position as general attorney for the American Society of Composers, Authors and Publishers?

Mr. Finkelstein. I think I have been general attorney for about eight years, and prior to that time I was resident counsel from 1943 to, I believe, 1948, and general attorney since 1948.

Mr. Pierce. When and by whom was ASCAP founded?

Mr. Finkelstein. It was founded in 1914 by a small group of writers and publishers under the leadership of Victor Herbert and his attorney at that time, Nathan Burkan, who became first general counsel for ASCAP.

Mr. Pierce. What is the purpose of ASCAP?

Mr. Finkelstein. The purpose is to do for the composers and authors and for the users what they could not do individually in licensing performances of musical works. When a writer writes a song, he has no necessity of acting collectively when he goes to a publisher. He does that individually.

Mr. Pierce. Did the Department of Justice in 1935 bring an antitrust suit against ASCAP for monopolizing the licensing of songs?

Mr. Finkelstein. It did bring an antitrust suit against ASCAP in 1934, yes, sir.

Mr. Pierce. Is it true that on March 4, 1941, a consent decree was entered in that case which dissipated ASCAP's monopoly power by requiring certain administrative changes in ASCAP's organization and by restricting ASCAP's permissible activities?

Mr. Finkelstein. I don't think that is technically correct. A law suit was brought in 1934. It was tried in the old court house in 1935. After trying the case before Judge Goddard for ten days, the Government asked for an adjournment, and Judge Goddard told us we might as well consent, because if we didn't consent to the adjournment the Government could discontinue voluntarily. The suit was then adjourned and we didn't hear anything further about that. We were going to stipulate some facts. By the way, we were rather optimistic about our chances of success in that law suit. Five years later our agreement with the broadcasters was about to expire,- those were five-year agreements,- and the Department of Justice became active again. We then entered a consent decree on March 4, 1941, under these circumstances: the 1934 law suit was dismissed because a consent decree entered in a law suit in which testimony has been given, would be res judicata in favor of anybody making claims against the defendant, and we wouldn't have entered into a consent decree under those circumstances. So the Government withdrew that lawsuit in 1941 and filed a new law suit, and the decree was entered in that new suit.

Mr. Pierce. What were the terms of that consent decree in 1941, generally speaking?

Mr. Finkelstein. The main thing was to require the Society to have an alternative method of licensing,- a program system of licensing for broadcasting in addition to the old blanket license system that had theretofore prevailed. Both the program license and the blanket license are blanket licenses, that is, the user has the right to use everything in the repertory without getting any special permission; by merely entering into the license agreement the broadcaster has a right to use everything.

The difference in the new system of licensing is that under the program license they pay only on those programs that use ASCAP music, whereas under the blanket license they pay a percentage on all their advertising, less certain discounts. I think that is the main thing. And then the rights were made non-exclusive. I think those were the main features of the 1941 consent decree.

Mr. Pierce. Did the 1941 consent decree also require that the society could not license any rights other than non-dramatic performing rights in musical compositions?

Mr. Finkelstein. I don't remember whether that was in the 1941 decree or not. Certainly it was in the 1950 decree.

Mr. Pierce. Did it also require that a member of ASCAP must be free to license music directly without the Society's intervention?

Mr. Finkelstein. Yes, subject to certain limitations which were discontinued in the 1950 decree.

Mr. Pierce. Did it also require that membership in this Society must be available to any composer or author of copyrighted music or compositions who has had at least one of his works regularly published and to anyone actively engaged in the music publishing business whose musical compositions have been used or distributed on a commercial scale for at least one year, and who assumes the financial risk involved in the normal publication of musical works.

Mr. Finkelstein. That sounds like the language of the 1950 amended judgment, but it may have been in the 1941 decree.

Mr. Keating. Are you coming, Mr. Pierce, to the amendments of that decree later?

Mr. Pierce. Yes, sir.

Mr. Keating. I want to ask a question there.

Mr. Pierce. All right, sir.

Mr. Finkelstein. Is my recollection wrong about that, that it was the 1941 decree?

Mr. Pierce. The 1941 decree. In fact, you wrote it up very nicely in one of your articles, Antitrust Laws and the Arts, by Mr. Herman Finkelstein.

Mr. Finkelstein. That was a talk I gave at the University of Chicago Law School, as I recall, in 1952.

Mr. Pierce. It also required, did it not, that the Society must be governed by a board of directors, and there would be twelve publishers, twelve writers on this board?

Mr. Finkelstein. That is correct.

By the way, on that, in 1941 the board was elected, one-third every three years, and in 1950 it was changed so that the whole board had to be elected at one time, every other year.

Mr. Pierce. Mr. Finkelstein, in what way does ASCAP differ from BMI?

Mr. Finkelstein. I think it would probably be easier to try to find out their similarities, there are so many differences.

First, ASCAP is an organization of those people who write and publish music in America. It is a membership association; the members elect their own directors; they elect their own officers; they have only one interest and that is promoting the creation and publication and dissemination of music. As I view the antitrust laws, an organization, like ASCAP or BMI or anybody else, should not be permitted to combine in great numbers, unless there is a necessity for that combination. ASCAP is a voluntary association. By its consent decrees its activities are limited to those things for which the combination is necessary, that is, it can only license the non-dramatic performing rights, because in all other fields the writer and the publisher can shift for themselves and so can the user.

It must not publish anything, it must not record anything; it must not own any copyrights; it must not exploit one work or try to push one work as against another, and it must treat all members alike. It can't make deals with one that it doesn't make with another. A member's participation in the license fees derived through ASCAP - through this clearing house called ASCAP - depends upon the public acceptance of the individual's works.

Each member is in competition with every other member to get as large a share of those royalties that are collected as possible. That is ASCAP on the one hand.

Now, BMI --

The Chairman. Has ASCAP followed that principle? Is it interested in any other activity than taking care of the performing rights of its members?

Mr. Finkelstein. None whatsoever, and it is completely neutral in how those compositions are exploited. ASCAP may tell its licensees what they get when they buy the ASCAP license, but it doesn't take a new composition and advertise it or anything like that, or even publicize it or say anything about it.

E 611

CBS v. ASCAP

Plaintiffs' Exhibit No. 568

Excerpts from Deposition of H. Finkelstein in Cascade Broadcasting Co. v. ASCAP.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF YAKIMA

- -x

CASCADE BROADCASTING COMPANY, a Washington corporation; CASCADE BROADCASTING COMPANY, a Washington corporation, (formerly Halton),

Plaintiffs,

-against- 45877

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Defendant.

- -x

575 Madison Avenue,
New York, N.Y.

October 12, 1966.

DEPOSITION of HERMAN FINKELSTEIN, pursuant to Order, Notice and Stipulation, taken on the 12th day of October, 1966, upon oral examination at the instance and request of the plaintiffs, before a Notary Public of the State of New York.

- - - - -

Appearances:

The plaintiffs appearing by:
LEO C. KENDRICK, Esq., and
WILLIAM H. MAYS, Esq.
(of Messrs. Gavin, Robinson, Kendrick, Redman & Mays.)

The defendant appearing by:
JAY H. TOPKIS, Esq.
(of Messrs. Paul, Weiss, Rifkind, Wharton & Garrison.)

Present:

BERNARD KORMAN, Esq.,
Assistant general counsel of ASCAP.

- - - - -

This deposition is taken for discovery purposes under the provisions of the Washington Rules of Pleading, Practice and Procedure.

- - - - -

Whereupon, the following proceedings were had and testimony given, to wit:

HERMAN FINKELSTEIN, being first duly sworn by the Notary, was examined and testified as follows:

have it read back?

THE WITNESS: Yes, I would like to have the question read back.

(The following was read by the reporter:

"Is it economically impossible for ASCAP to function under a system where it must state a specific dollar price for the performance of each composition in its repertory by each kind of user who might seek to make such performance?")

THE WITNESS: Well, I suppose we will have to take the different kind of users and take the different types of compositions and see how we go about it.

Let us say that you are a proprietor of a dance hall in the State of Washington. From your point of view, from the point of view of the dance hall proprietor, we now assume, do we, that the only way that you can pay for the use of music on a voluntary basis is on the basis of accounting, filing and paying for each separate use of each separate composition? Is that what we are assuming?

Q Yes.

A That means that each dance hall proprietor would have to be or each orchestra leader would have to be

familiar -- would have to have alongside of him, would have to have with him every evening a list of all the compositions and the price charge for each composition; and if a patron in the establishment asked that a given composition be performed -- and I suppose you have done that, asked the orchestra to perform a given composition with which you had some particular affinity -- he would have to check first whether he had a license to do it, I assume, and he would have to run down the list to see if the thing was on the list, and see at what price or to see if it came within the range that he was willing to pay.

Since he doesn't pay it, since the proprietor did the paying, he would have to have some arrangement with the proprietor, so that he wouldn't be infringing.

Now, no dance hall proprietor in the State of Washington could economically do business on that basis.

MR. TOPKIS: Forgive me, Mr. Finkelstein --

THE WITNESS: I have reached the conclusion.

MR. TOPKIS: The question is can ASCAP function economically under such a system.

THE WITNESS: The question is not addressed to the user at all at the present time?

Q No. My question was first as to ASCAP, why it would be economically impossible for ASCAP to function.

A Now, then, we are going to assume for the purpose of trying to answer the question that the dance hall proprieto under the circumstances that I gave, could do all these things, and we are going to find out how ASCAP would.

Q Not necessarily, no. You don't have to assume anything about the dance hall proprietor.

I am just interested in finding out why ASCAP cannot issue a per piece license.

A ASCAP has to deal with someone, it has to make arrangements for licensing.

Q If it would help you in answering the question go ahead and assume that we have the problem with ASCAP as well as the problem of the user.

A You have a case of sheer economic impossibility. It would be silly to try to talk about how much it would cost under these circumstances, because there would be no comme in the licensing of performing rights.

Q Presuppose that there are no problems with respect to the user.

A No, we are not presupposing that there are no proble We are assuming that the user is willing to do all these things, and we are now going to get into the cost to ASCA of trying to do business on that basis.

Q Yes?

A ASCAP would have to furnish, would either have to furnish to each user a list of all the compositions and price for those compositions, or it would have to rely on the user going to the files of the Secretary of State. Our experience at least there is that they do not go to those files.

So that if there is to be any commerce in these rights, a list would have to be given to each user, the compositions and the price, and the price for different kinds of users, is it a chorus, a vocalist, or is it instrumental, a large orchestra or a smaller orchestra, what is the seating capacity or dance area, do they sell drinks, do they charge admission, what is the admission price -- these are all factors that would affect the price of the individual composition.

Now, having given you that, we get to the point where ASCAP must not fix a price itself for an individual composition, unless both the user and the member whose work is involved requests ASCAP to fix such a price.

So that until you get to the point where the user made the request and the member made the request that ASCAP fix a price, ASCAP would have no power to fix the price. It would violate the consent decree which was entered into with the United States Government if it would

fix a price for an individual use of a particular composition.

Q All right. Then I understand from what you just said there are two problems to ASCAP: One, the difficulty, from your explanation, in arriving at a price per piece; secondly, the problem involved in the consent decree.

MR. TOPKIS: I don't think the witness has finished.

MR. MAYS: I am sorry.

THE WITNESS: I thought I would rest at that point and let another question come. If the question is, "Is that all?" The answer is "No, that is not all."

Q Do I understand that these are your first two points as an economic impossibility for ASCAP?

A I would rather say that my statement speaks for itself.

Q You have other reasons?

A Yes.

Q Please go right ahead.

A First, I want to say that I didn't know I was going to be examined on that subject this morning, I didn't know that I was going to be examined at all here. I have made

a lot of other appointments that I haven't kept. I was here yesterday morning, you know, at the beginning. Because I had other appointments all day yesterday, I haven't had a chance to refresh my recollection or check the specific items what these things are, and so when I am testifying now, I am just giving you my reaction as I see it, you know, without making any specific preparation for this examination.

If I may go on now, bear in mind I am general counsel for ASCAP. You had Paul Marks, I understand, who is familiar with all the details of the financial arrangements. I am familiar with what the factors are that have to be considered.

Q Yes.

A You see, when we have a blanket license, and this is throughout the world, the users, as well as people who create these works, can in this area do business only on a blanket license basis.

If you will make multiple uses of compositions, the user can't afford to keep track of each composition, nor can the licensor keep, the copyright owner or the licensing agency afford to keep track of each use.

There are so many users that pay the minimum rate of $60 a year for the right to use the whole repertory,

and I would doubt on an individual licensing basis whether anybody could afford to issue a license for a specific work on an individual basis for much under that.

Just to keep the machinery of licensing going, to have the correspondence back and forth and for the clerical set-up -- but we are assuming now that all this could be done through the ASCAP clearing house.

I think ASCAP has about 600 employees now, without any individual licensing, without any keeping of records of individual uses, except to the extent that the radio and television networks report.

Symphony orchestras report uses, but they do not report every encore. They are protected in giving encores when they have a blanket license, but if they had to operate on a per piece basis, they couldn't give an encore.

All this could not be done on an individual licensing basis, but let us assume that we have some way of doing it. Now, we would have to know what were the encores. Let us assume we are at a concert now and we have the proposed program or we know what is scheduled in advance, but if they are going to pay for each composition, then we have to have somebody attend the concert to hear what encores were performed.

Now, you might have to do this for a number of people. Assume that their reports would be honest, you rely on that, but there is no manager who keeps a record, no artist who keeps a record of encores. So at this point at least the Society would have to have somebody attend each concert to find out what encores there were and to report it so the Society would be paid for it.

I don't know how all this could be arranged. I know that if the Society doubled or tripled its present staff, it would not have enough people to issue licenses on this basis, assuming that you could find the users willing to account and buy licenses on that basis.

Now, as to the individual member, of course, the Society would have to ask what price he wanted for a particular work. The Society would have to then advise the member that these are the known users in the State of Washington. Besides, I would have to have a list, this is the kind of operation they have, we would have to know something about their admissions and so forth, about their operating policy, the kind of orchestras they have, the number of nights a week they are open and perform music, we would have to gather all this information and supply it to all the members, and then find out what price they would be willing to quote.

Now, the publisher who is the copyright owner would not have the right to quote a performance fee without consulting the writer, because writers insist in the performance area they are equal owners in the performing rights with the publisher, but in other areas the publisher does it on his own.

In the performing area, the writer is quite jealous of his right to insist that the publisher not issue licenses without his approval. That is why in ASCAP you have a Board of twelve writers and twelve publishers, and the royalties are split equally between the writers and the publishers, so in this area they are co-owners in the performing rights.

I will have to find out between now and the time I have to testify in this case what it would cost to tabulate the information that would be required to issue licenses on the basis that you described.

I have only mentioned one thing, I have mentioned symphony ensembles and dance halls. Let us take a radio station. We analyzed the amount that we get per performance from one of the radio stations in Washington, and my present recollection is that it ~~turned out~~ that we get about five cents per performance from that station. We also analyzed what it costs to tabulate or run through

all the data. Of course, a lot of the stuff is manual before it gets to the machine, and it costs from forty cents to sixty cents to run through the performance, from the point of performance to the time it becomes a royalty to the author and publisher.

Q Per performance?

A Per performance that is tabulated.

Q Yes?

A You show us how we can spend forty or sixty cents to work out something for which we get a nickel, and the way that is done is not more than three performances out of a thousand are run through the machine when we issue licenses on a blanket basis and make distribution on a national basis and we have all the stations in different geographical areas.

This is a sampling device that was built up by an outside organization working with the Bureau of the Census and the Department of Justice, supervised by representatives of the Federal Court.

Q You are referring now to your internal distribution system?

A Yes. I say that under that sampling system it costs forty to sixty cents for each performance that enters into that survey, to check it from the point of the performance

reaching the Society's attention to the time money ends up in the author's pocket.

So you see, by and large, if you take three performances out of a thousand that are actually given, with this large varied type of performance that you have throughout the United States, that is a large enough universe, as the economists call the thing, that is a large enough universe to have this small sampling.

So that either you would have to raise the rates to the broadcasters in the State of Washington from what amounts to, at least in this section, a nickel a performance, to an amount that would take care of the forty-cent cost of distribution and then leave something over for actual compensation to the writer and publisher of the music.

It certainly is not in the cards. If we were to try to get that money from the broadcasters in the State of Washington, they would be driven to using public domain works, as they did in 1940; or give up the use of music, and today broadcasting is 55 minutes of music and five minutes of news.

My recollection is that in this very case, Mr. Bostick, whoever the employee is that was in charge, said that they do not keep records of their uses. That

means if the user doesn't keep records, the Society would have to have somebody there to tabulate what goes on.

Now, we have had this experience with one of the largest stations in the United States having a per program license that we just happened to monitor them for three days, and then when their reports, their per-program reports came in -- and this is the kind of thing you have to do with broadcasting where we have had experience -- you have to check on the accuracy of the reports that do come in, and that is a pretty expensive thing.

I think we could show that we lost money on every program contract that we had with the broadcast industry, because you have to spend enough money to keep these people honest or to try to at least in an area where even an honest user has an impossible task of record-keeping.

So we would have to keep the records and keep a check on them.

I will mention the station we taped. We taped the station for three days, and then we checked the report that came in on the program that they reported, and any similarity of what appeared on the report and what was on the tape was purely coincidental. There was almost no

similarity between the report that they sent us and the analysis of the tapes that were made.

Anyway, it is a very expensive thing to tape stations and analyze them.

The station said to us they always thought that this program manager didn't know his business, and so they let out the program manager and switched to a blanket license.

Like Cascade in this case doesn't keep any records, the other stations don't keep records, and no statute can make them keep records. So ASCAP would have to have a constant survey of what goes on in all the stations in Washington, in addition to the cost of having them pay for something, and the cost of getting the money into the pockets of the writers and publishers.

That in general gives you the reasons why it is economically impossible to work with the kind of system that you suggested, the per piece form of license.

Q This station in Washington which you believe paid five cents per performance --

A That is my best recollection.

Q Do you recall what station it was?

MR. TOPKIS: Do you remember the station that was involved?

E 627

CBS v. ASCAP

Plaintiffs' Exhibit No. 572

Excerpts from deposition of Edward Cramer in BMI v. NBC.

E 628

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

BROADCAST MUSIC, INC., CHARING CROSS MUSIC, INC., EVIL EYE MUSIC, INC., FOLKWAYS MUSIC PUBLISHERS, INC., MACLEN MUSIC, INC. and PAUL SIMON, individually and on behalf of all affiliates of Broadcast Music, Inc., similarly situated, and NORTHERN SONGS LIMITED,

Plaintiffs,

-against- 70 CIV 1785

NATIONAL BROADCASTING COMPANY, INC.,

Defendant.

----------x

Deposition of plaintiff BROADCAST MUSIC, INC., by EDWARD M. CRAMER, taken by defendant pursuant to notice and agreement, at the offices of Messrs. Cahill Gordon Sonnett Reindel & Ohl, 80 Pine Street, New York, N. Y. 10005, on February 12, 1973, at 10:45 a.m., before Harvey Keitel, a Shorthand Reporter and Commissioner of Deeds of the City of New York.

Certified Shorthand Reporters

25 ETON ROAD
ROCKVILLE CENTRE, N.Y. 11570
(516) RO. 6-7009

150 NASSAU STREET
NEW YORK, N.Y. 10038
(212) WOrth 4-3567

APPEARANCES:

Messrs. HUGHES HUBBARD & REED,
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BY: ROBERT J. SISK, ESQ.,
Of Counsel

Messrs. CAHILL GORDON SONNETT REINDEL & OHL,
Attorneys for defendant National
Broadcasting Company, Inc.,
80 Pine Street,
New York, N. Y. 10005
BY: DAVID R. HYDE, ESQ.,
KENNETH W. ORCE, ESQ.,
Of Counsel

PRESENT:

Messrs. CRAVATH SWAINE & MOORE,
One Chase Manhattan Plaza,
New York, N. Y. 10005
BY: ROBERT K. BAKER, ESQ.,
Of Counsel

MARSHALL WELLBORN, ESQ.,
NBC Law Department

oOo

oOo

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties herein, that the within deposition may be signed and sworn to before any officer authorized to administer an oath, with the same force and effect as if signed and sworn to before the officer before whom said deposition is taken.

oOo

EDWARD M. CRAMER, called as a witness, being first duly sworn by the Commissioner of Deeds (Harvey Keitel) and stating his residence as 254 Chestnut Street, Englewood, New Jersey, testified as follows:

EXAMINATION BY MR. HYDE:

Q Mr. Cramer, for the record, will you state your present occupation and title.

A I'm president and chief executive officer of Broadcast Music, Inc., BMI.

Q Could you briefly go back and outline your educational background, starting with college and your professional endeavors?

A I attended Columbia College and Cornell Law School.

Q What year did you graduate?

A 1950. And then I attended New York University School of Law, where I was a member of the faculty and--for a year--got my graduate degree there.

Q Did you specialize in some field of law?

A Yes. In the area of trade regulations and copyright antitrust law.

I joined the firm then known as Rosenman, Coldmark, Colin & Kaye, as an associate, in 1951.

Q Well, do you recall whether it is above 50 percent?

A Yes.

Q Above 60 percent?

A I believe so.

Q Above 70 perent?

A I don't know.

MR. SISK: Off the record.

(Discussion off the record.)

MR. HYDE: May we have this document marked as Defendant's Exhibit 5 for identification.

(Consent decree entered into between The Department of Justice and BMI in December, 1966 marked as Defendant's Exhibit 5 for identification, as of this date.)

Q Mr. Cramer, I show you Defendant's Exhibit 5 for identification, ask if you can identify that document.

A Yes.

Q What is that?

A It appears to be, without reading it in its entirety, the consent decree entered into between the Department of Justice and BMI in December, 1966.

Q Mr. Cramer, would you look at paragraph 4 of that decree.

A I've looked at it.

Q What is a direct performance to the public?

A I can only assume what that means as used in this sub-paragraph. I would have to answer just what the words said, that performance directly to the public.

Q Well, can you give us an example of such performance?

A The words are not generally in use in the industry so that I know of no particular special meaning that they have. I would just say, if I were asked what a direct performance would be, I mean, if somebody stood up in front of an audience and sang a song.

Q Since you became the president of BMI, Mr. Cramer, has BMI ever granted permission to the writers and publishers of a musical composition to issue a non-exclusive license in accordance with that paragraph 4?

MR. SISK: I object to the form of the question.

A I'm unaware of any request ever made to us or any license ever granted.

Q Well, let me break it down. Are you aware of any request ever made to BMI for the permission which is referred to in that paragraph?

MR. SISK: I think he's just answered that question.

CBS v. ASCAP

E 633

Plaintiffs' Exhibit No. 575

ASCAP's Reply Memorandum (by Sullivan & Cromwell) dated 5/1/70, United States v. ASCAP (Application of NBC).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Defendant.

In the Matter of the Application of NATIONAL BROADCASTING COMPANY, INC.,

Applicant,

For a License for Its Television Network.

Civil Action No. 13-95

In the Matter of the Application of NATIONAL BROADCASTING COMPANY, INC.,

Applicant,

For an Interim Fee for a License to Perform Certain Listed ASCAP Compositions on Its Television Network.

ASCAP'S REPLY MEMORANDUM

ASCAP's position, as set forth in its Memorandum of April 15, 1970, is:

(1) It is barred under the antitrust laws generally and under the Amended Final Judgment specifically from issuing the license requested by NBC.

(2) Since the license NBC purports to seek is not one that ASCAP may grant or that this Court should require, the interim fee applied for in this proceeding may not properly be based upon such a license.

In this memorandum we reply to the challenge of that position asserted in the Memorandum for the United States and in NBC's reply memorandum, and also answer the belated assertion by NBC that ASCAP's compliance with the Amended Final Judgment amounts to a violation of the antitrust laws.

THE AMENDED FINAL JUDGMENT DOES NOT REQUIRE ASCAP TO ISSUE A LICENSE FOR 2,200 COMPOSITIONS

Both NBC (Reply Memo, pp. 6-14) and the Government (Memo, p. 3) conclude that ASCAP is required to notify its members of NBC's request, and should accordingly be ordered by the Court to do so, and that this Court should accordingly fix an interim fee based on the right to perform less than all the compositions in the ASCAP repertory.

That conclusion in no way accords with Section VI of the Judgment. Section VI of the Judgment orders ASCAP to

issue licenses "to perform all the compositions in the ASCAP repertory" and clearly directs ASCAP to refrain from issuing licenses "to perform one or more specified compositions in the ASCAP repertory" except in specified situations. ASCAP is permitted, but not directed, to grant licenses for specified compositions in the following two specified situations:

(i) if both the user and the members in interest request ASCAP in writing so to do;

(ii) if ASCAP, at the written request of the prospective user, shall have sent a written notice of the prospective user's request to each member in interest at his last known address, and the member shall have failed to reply within 30 days thereafter.

The Government concludes (Memo, p. 3) that because Sections VI and IX "do refer to the possibility" of licensing individual compositions, ASCAP is required to "notify its members in interest of NBC's request." Nothing in the Judgment requires ASCAP to use its group machinery to communicate with a limited portion of its membership on behalf of a bulk user of music. Moreover, that argument skirts the basic issue raised by NBC, whether an applicant can require ASCAP to license less than all its repertory despite the

clear language of Section VI.

NBC goes a step further. NBC argues that the emergency procedures outlined in Section VI require ASCAP in all instances (a) to send notices to its members, so that they may "be afforded the opportunity to deny ASCAP the right to license their songs" (NBC Reply Memo, p. 8), and (b) subsequently to issue a license to NBC for such of the 2,200 compositions as "it is empowered to license . . . on the basis of a reasonable fee, either as negotiated between ASCAP and NBC, or as fixed by this Court . . ." (NBC Reply Memo, p. 11).

To support the reading urged by NBC, Section VI would have to be restructured to read as follows [words in the Judgmen which would be eliminated are lined through; words not contained in the Judgment are underlined]:

VI. "Defendant ASCAP is hereby ordered and directed to grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory. Defendant ASCAP shall ~~not~~ also grant to any user a license to perform one or more specified compositions in the ASCAP repertory, ~~unless~~ if both the user and member or members in interest shall have requested ASCAP in writing so to do~~, or unless~~. ASCAP, at the written request of the prospective user shall ~~have sent~~ send a written notice of the prospective user's request for a licens to each such member at his last known address. If such member shall have failed to reply within thirty (30) days thereafter, ASCAP shall grant to such prospective user a license to perform th specified compositions."

As set forth in our main Memorandum (pp. 10-11), the second sentence of Section VI, dealing with specific compositions, was intended to apply to users of a very few compositions and certainly not to broadcasters or networks which use music in bulk. When the 1950 Judgment was entered, no broadcaster or network had ever requested ASCAP to issue a license for an individual composition and it was not likely at that time that any requests would ever be made. The per program license was intended for individual stations that had expressed a desire for that form of license generally because they expected to use relatively few ASCAP compositions. The networks, acting as buyers for the large group of stations comprising their respective networks, recognized their obligation to have unlimited availability which assured access to all compositions by all stations for which it served as the clearance vehicle, without the musical content of programs being affected by complicated negotiations for, or disagreements as to, the charges for specific works.

It is easy to conceive of circumstances under which ASCAP might refuse to grant a license even though a member has failed to reply for a 30-day period. The member might have advised ASCAP that he has no means of passing on requests for such licenses and does not wish to entertain them, or the member may be away from his regular address

and there may be no way to reach him. This is not unusual in the case of writers and other artists. And perhaps most important, the nature of the request may be such that the notice would be meaningless to the member unless it were accompanied by some explanation that the Society was not in a position to make.

In the case of NBC's request, no particulars whatsoever are given as to the nature of each use; the programs on which the uses are to be made; the times when the uses are to be made; the stations on which the uses are to be made; the performance, whether vocal or instrumental; the accompanying script, if any; the use, background or feature; the amount paid by sponsors; the amount paid by the network to its affiliates and the amount paid by the network for similar uses of other works. All these are facts members are likely to want to know and which ASCAP is not in a position to answer with respect to the request by NBC.

On the other hand, if this were a request for a specific use by an occasional user without the means of approaching the members in interest, and if one of several members in interest was not reachable but the others wished to grant a license, ASCAP might at the request of the user and

the other members grant a license on behalf of the unavailable member.

In sum, the NBC argument contradicts the language and the intent of the Judgment, which provides that ASCAP shall receive a non-exclusive right to license, in the manner provided for in the membership agreement as modified by the 1950 and 1960 Judgments, and that the individual member shall retain his right to act individually. The procedure sought by NBC is clearly contrary to the spirit of the Judgment, since it would transform ASCAP from a conduit acting on behalf of all its members to an agent acting for some of its individual members.

NBC'S PROPOSED PROCEDURE IS AN ATTEMPT TO DEPRIVE INDIVIDUAL ASCAP MEMBERS OF THE SAFEGUARDS AFFORDED BY THE JUDGMENT TO THE INDIVIDUAL MEMBER

Both the Government (Memo, pp. 5, 6) and NBC (Reply Memo, pp. 16-18) argue that NBC's proposal will not impose an added burden on this Court. Both arguments are based on NBC's belated position that it will negotiate with the individual ASCAP members instead of with ASCAP for licenses for those compositions not included in the 2200 list, except in "one instance" (See Finkelstein 5/15/70 Aff't, par. 6).

The NBC approach is an obvious attempt to circumvent the procedure of the Amended Final Judgment giving this

Court the authority to set a reasonable fee for the type of license that ASCAP is permitted to grant. The NBC approach would compel ASCAP to act collectively in an area where the Judgment contemplates action on an individual basis only. The Judgment, in effect, codifies the antitrust laws. It has expressly reserved to individual members the right to act individually, and has expressly barred ASCAP from acting in this area.

Rather than substituting the unbiased working "of the market place" for the present procedure as NBC claims (NBC Reply Memo, p. 15), individual negotiation imposed on writers and publishers in dealing with NBC will in fact pitch the might of the NBC television network bargaining for more than 200 stations, against the individual composer of a new song seeking to have his work performed. Even established songs will die if they are kept away from a large enough public for a long enough period.

As pointed out in the accompanying Finkelstein affidavit, the NBC television network is a combination of some 200 stations placing their broadcasting facilities collectively in the control of the network and using network programs almost exclusively during the prime evening telecasting hours. As a result, the network has the power to prevent the public performance of any composition at the

time of greatest public exposure, and it has clearly indicated the intent to force an individual member to license at the price NBC sets or risk forfeiture of his opportunity for a public hearing of his composition.

The present procedure under which ASCAP pays the composer on a judicially supervised formula and the network negotiates with the Society for the right to perform any, some or all the songs in ASCAP's repertory, should not be disregarded.

ASCAP MAY PROPERLY REFUSE A LICENSE NOT REQUIRED UNDER THE JUDGMENT

Recognizing the futility of its own arguments for a license to perform less than all the ASCAP repertory, NBC resorts to a hasty assertion that ASCAP in some manner is violating the antitrust laws.

A similar charge was rebuffed as recently as 1967 by the Ninth Circuit Court of Appeals. K-91, Inc. v. Gershwin Publishing Corporation, 372 F.2d 1 (9th Cir. 1967), cert. denied, 389 U.S. 1045 (1968).

The Ninth Circuit rejected charges of block booking on the ground that the rights retained by the individual ASCAP members to license their compositions deprives ASCAP of any power in any copyright or group of copyrights to coerce an illegal tie-in. The Court stated:

> "There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved. There was no error in the trial court's finding that appellees have not violated the federal antitrust laws." 372 F.2d at 4.

Under the Judgment ASCAP receives only a non-exclusive right to license (Section IV). Accordingly, ASCAP does not have the monopoly power in the "tying" product generally associated with the owner of a copyright of a patent. Cf. International Salt Co. v. United States, 332 U.S. 392 (1947); United States v. Paramount Pictures Inc., 334 U.S. 131 (1948). A user desiring one composition or group of compositions may bargain individually with the members. Indeed, ASCAP has suggested that NBC address its request for a license for approximately 2200 compositions to the respective members in interest (Letter of March 17, 197 , Ex. C to 4/15/70 Finkelstein Aff't). As a result, ASCAP cannot be said to have the power to tie the license for the performance of a desired composition with a license to perform all its repertory. Cf. United States v. Loew's Inc., 371 U.S. 38 (1962).

NBC recognizes this principle and attempts to sustain its argument by stating that ASCAP's power arises

from its position "as the only source of a license covering any large number of those compositions contained in its repertory." (NBC Reply Memo, p. 4). That statement adds nothing. If ASCAP has no tying power in a single composition, it cannot gain any power by holding a group of compositions. The individual user remains free to approach each individual member for a license.

The desperation of NBC's attempt to mount an antitrust argument is highlighted by its claim that there is a "distinct likelihood" that ASCAP's "activities" are a violation of Section 7 of the Clayton Act (Reply Memo, p. 7). Apart from the other infirmities of that argument, Section 7 clearly and unequivocally applies only to acquisitions by corporations and ASCAP is an unincorporated membership association.

CONCLUSION

The proposals made by NBC, and supported in part by plaintiff, are contrary to the Amended Final Judgment and would flout the antitrust laws which safeguard the rights of individuals against the collective bargaining power of a pool of 200 broadcasters represented by the NBC network. The type of license sought by NBC should not be approved, and ASCAP's application for an

interim fee should be granted.

Respectively submitted,

SULLIVAN & CROMWELL
48 Wall Street
New York, N. Y. 10005

HERMAN WINKELSTEIN, ESQ.
575 Madison Avenue
New York, N. Y. 10022

Arthur H. Dean
Roy H. Steyer
Joel M. Miller

Of Counsel

May 15, 1970

CBS v. ASCAP

Plaintiffs' Exhibit No. 579

BMI pamphlet, "You--and the Music You Use", dated 7/69.

How does the federal copyright law affect me as a music user?

If you operate any business where music is performed for the entertainment of your audience, your customers, or your employees, you must have permission from the copyright owner of each composition you use.

The total term of copyright for a musical composition is 56 years. However, pending a revision of the present Copyright Act, the Congress has extended this term so that practically every musical composition you use written since September 19, 1906, is protected by federal copyright law.

The law does not permit the responsibility of the proprietor of an establishment where music is performed to be passed on to an employee, an orchestra leader, an entertainer, or any other person. All who participate in the infringing performance are responsible.

You must secure permission whether the work is performed by live musicians, on records, tapes, or by any other mechanical means, except coin-operated phonographs.

What is a copyright?

A copyright is the property right which permits the creator of a work to exercise exclusive ownership rights over the product of his imagination and its use.

In the field of music, the basic period of a copyright is 56 years plus the extension voted by the Congress, covering all music written since September 19, 1906.

What is a performance for profit?

The federal courts, including the Supreme Court, have consistently held that any public performance of copyrighted music, the basic motive of which is profit, is a performance for profit. This is true even though no cover charge, minimum charge, or any other charge is made for admission or entertainment.

E 648

What is my liability for infringement of copyright?

Publicly performing copyrighted music for profit without permission is a violation of federal law. *(See footnote.)**

The copyright law prescribes criminal as well as civil penalties for unauthorized public performance for profit of copyrighted musical compositions. The minimum damages which a court is permitted by the law to grant for a single performance of a single composition is $250.

What is BMI?

BMI was created in 1940. Its sole purpose, to serve as an organization which would acquire and license performing rights and, in so doing, bring about healthy and necessary competition. BMI was organized by a group of music users who neither collect dividends nor receive special rates from it.

How does BMI operate?

BMI acquires performing rights from independent writers and publishers, collects license fees from the organizations which perform music for profit, and, in turn, makes payment to the creators of the music which is used.

It licenses the music of composers and publishers who are resident in every one of the United States. Through agreements with performing rights societies in other countries, it brings foreign music to America and makes American music available throughout the world.

BMI does not publish music. BMI does not record music. The rights to do so belong exclusively to the composers and publishers.

* *Herbert v. Shanley Co.*, 242 U. S. 591.
Buck v. Jewell-LaSalle Realty Co., 283 U. S. 191.
Irving Berlin, Inc. v. Daigle, 31 F.2d 832.
Leo Feist, Inc. v. Lew Tendler Tavern, Inc., 267 F.2d 494.

What does BMI do with the license fees it collects?

Except for operating expenses and a reasonable reserve, BMI pays all of the money it collects to the composers and publishers whose music is performed.

BMI determines payments to composers and publishers on the basis of the performance of music on thousands of independent stations as well as on country-wide networks. It does so because the performance of music on radio and television represents the truest gauge of public demand for music of all types and the broadest use of music to meet that demand.

On the basis of scientific sampling systems, when an affiliated composer and publisher have more performances of their music, their payments from BMI are increased.

Why shouldn't I deal directly with composers and publishers instead of dealing with BMI?

There are many benefits in dealing with BMI.

You benefit because by a single transaction, the acquisition of a BMI license, you obtain permission to perform all of the music in BMI's diversified repertory, representing the creativity of thousands of composers and publishers and a total of hundreds of thousands of copyrighted musical selections.

You benefit because BMI does your work for you, making it unnecessary for you to engage in the impossible time- and money-consuming effort of trying to deal directly with the American and foreign composers and publishers whose music you use.

You benefit because BMI pioneered in the establishment of uniform, nondiscriminatory rates, and its continuing existence is a guarantee of honest competition in music licensing.

Why do I need a BMI license?

You need a BMI license because BMI is a vital force in American music. For many years it has licensed the majority of all of the current song hits and its repertoire contains a broad section of popular favorites, country and western music, Latin American music, rhythm and blues—including rock and roll—jazz music, folk music, concert music, and Broadway show music. Only with a BMI license can you have access to the BMI repertory. The BMI license gives you the right to play the music your customers demand.

What is BMI's share of the music market?

As one indication of the ability of BMI affiliated writers and publishers to create the music the American public prefers we cite the following figures, based on authoritative Billboard charts, for the first six months of 1969. In the compilations based on retail sales, BMI music accounted for

81.7% of the Hot 100 Singles

59.3% of the Easy Listening Singles

89.3% of the Rhythm and Blues Singles

84.8% of the Country Singles.

In addition, during the year 1968:

BMI music was in 100% of the Top Country lp's;

Plus 96% of the Top Rhythm and Blues lp's.

65% of all the music in the Top 100 lp's was BMI;

86 of the Top 100 lp's contained BMI music.

How can I get a license from BMI and what will it cost?

A call or letter to BMI will bring you full information about BMI license fees. These reasonable fees have been determined in negotiations with groups representing the broadcasting industry as well as with such trade organizations as the American Hotel & Motel Association, the Arena Managers Association, the International Association of Amusement Parks, and the National Ballroom Operators Association. In assessing fees, BMI uses the most appropriate yardstick of payment for each type of music user.



For further information about a BMI license, address inquiries to

BROADCAST MUSIC, INC.
589 Fifth Avenue, New York, N. Y. 10017

230 N. Michigan Avenue, Chicago, Ill. 60601

9720 Wilshire Boulevard, Beverly Hills, Calif. 90212

710 16th Avenue S., Nashville, Tenn. 37203

150 S.E. Second Avenue, Miami, Fla. 33131

9/69

E 652

CBS v. ASCAP

Plaintiffs' Exhibit No. 689

Letter dated 10/29/64 from Allen Arrow to George Lee.

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

MAY 1973

PX
689

E 653

October 29, 1964

Mr. George Lee
Music Publishers Holding Corp.
488 Madison Avenue
New York 22, New York

Re: 3M for Music Publishers Holding Corp.

Dear Mr. Lee:

In accordance with your request, this letter is written to summarize the proposal made by 3M to M.P.H.C. in connection with 3M's M-700 background music program.

The program would be used in connection with the M-700 machine which was demonstrated to you in your office. The machine is equipped with an automatically reversing tape deck which contains 700 selections and is presently incompatible with any other machine known to 3M.

It is 3M's intention to sell the machine with its accompanying tape to commercial locations where the tape may be publicly performed for profit or otherwise.

3M proposed that it have access to your library of musical compositions for the purpose of embodying them in its program. Our client will pay to M.P.H.C. a mechanical royalty of Two Cents (2¢) per selection per tape and a public performance fee of Three Cents (3¢) per selection per tape. These sums will be accounted for to you periodically based upon tapes sold by 3M to its distributors. There is no return privilege.

3M further proposes to guarantee to M.P.H.C. that a minimum of Two Hundred (200) selections from your library will be included in the tape program. This will result in an amount payable to

Mr. George Lee
Music Publishers Holding Corp.

October 29, 1964

M.P.H.C. of Ten Dollars ($10.00) for each tape sold by 3M. 3M will agree to guarantee to M.P.H.C. Fifty Thousand Dollars ($50,000.00) per year as a minimum royalty. 3M will have the right to extend the contract from year to year in the event it agrees to pay the minimum guaranteed royalty stated above and include the same minimum number of selections in its library during each extended year.

Each tape sold by 3M will carry a stamp or label showing the date of purchase and a statement that the public performance fees have been paid only for a period of three years from the date of purchase. At the end of the three-year period, the purchaser will be required either to:

(a) refrain from using the tape, or

(b) purchase a new tape and thus M.P.H.C. will be entitled to a further performing fee, or

(c) take a direct license from ASCAP and/or BMI.

It is our client's belief that the execution by M.P.H.C. of an agreement with 3M embodying the above provisions would result in the payment of a substantial sum of money each year to M.P.H.C. In addition, M.P.H.C. will be of assistance in creating an entirely new source of income for copyright proprietors in the United States.

Should you want to ask specific questions concerning this program, please contact:

Mr. R. F. Lindgren
Minnesota Mining and Manufacturing Company
2501 Hudson Road
St. Paul 19, Minnesota
Telephone: (612) 733-0571

or the undersigned.

Sincerely yours,

aha/tjg

Allen H. Arrow

cc: Mr. R. F. Lindgren

E 655

CBS v. ASCAP

Plaintiff's Exhibit No. 722

AGAC Bulletin dated May 1966, Volume 3, No. 2.

Anniversary Year

E 656

American Guild of Authors and Composers

BULLETIN

Bulletin Committee: EDWARD ELISCU
EDWARD HEYMAN
KAY SWIFT
JOAN WHITNEY

TON LANE, *President*
AM STERN,
Executive Director

50 WEST 57th STREET, NEW YORK, N. Y.
6331 HOLLYWOOD BLVD., HOLLYWOOD, CALIFORNIA
VOL. 3, No. 2 MAY 1966

RICHARD RODGERS RETURNS TO AGAC

ic *Mizzy New West Coast Chairman*

ic Mizzy, who has scored heavily as composer-con- or of TV series, including "The Addams Family", has cepted the post of West Coast Chairman of AGAC. new California Steering Committee has also been formed: rry Ruby, Johnny Mercer, Sammy Lerner, Sammy Fain, old Adamson, and Donald Kahn.

The complete West Coast Committee is: Harold Adam- , Gene DePaul, Ray Evans, Sammy Fain, Ray Gilbert, nny Green, Donald Kahn, Sammy Lerner, Jay Livings- , Jerry Livingston, Jimmy McHugh, Johnny Mercer, Vic izzy, Ben Oakland, Don Raye, Harry Ruby, Harry Warren, Ned Washington, and Paul Francis Webster.

Vic Mizzy replaces Harold Spina who has resigned. AGAC represents more than 800 writers on the West Coast. Though there's been a decline in film musicals since 1950, he West Coast has steadily risen in importance in the usic business with the establishment of many new record rms (Warner's, Reprise, Liberty, etc.), TV production, nd as a source of record artists.

's Not A Plane, Not *Superman*
's AGAC's *Plaza* Ball, October 27, 1966

The 35th anniversary of the American Guild of Authors d Composers, formerly SPA, will be marked by a gala all at the Plaza, Central Park South and 5th Avenue, hursday, October 27. Edward Heyman, chairman of the entertainment committee, said the affair will include hor d'oeuvres, dinner, dancing, and an exciting entertainment program (details later). Dress is optional, black-tie or informal.

Tickets will be $10 per person. Until July 1, buying of tickets will be limited to Guild writers. After that, it will be on a first-come, first-served basis. Many friends of AGAC, publishers, recording artists, record executives, arrangers, radio and TV officials have expressed a willingness to come, but they will be accommodated after the membership has had an opportunity to reserve tickets. Capacity of the Plaza ballroom, one of New York's historic landmarks, is about 700.

Mail Checks Promptly

Reserve your tickets now by sending a check to cover your party ($10 per person). Mark the check payable to the AGAC 35th Anniversary Ball. Don't miss this once-in-a-lifetime event!

Ads in *BILLBOARD, CASH BOX*

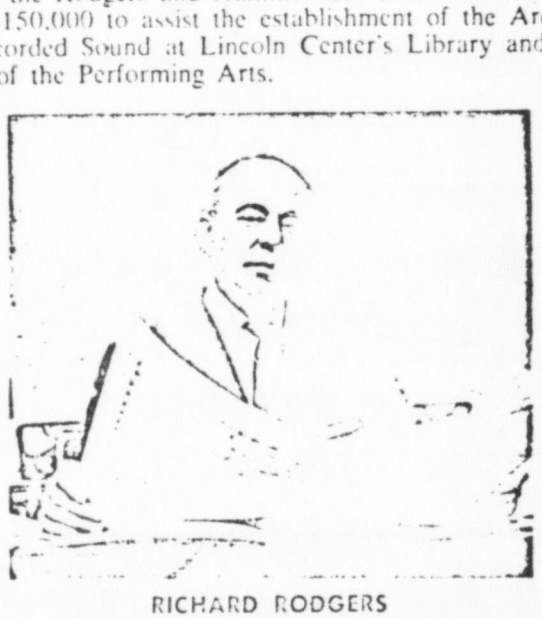
AGAC began (April 23) a year long ad drive spotlighting our benefits to writers in *Billboard* and *Cash Box*. Within days, AGAC, New York and Hollywood, felt the impact of inquiries from the "BUILD THE GUILD" ads.

Richard Rodgers, a giant of the American musical theatre, has become a member of the American Guild of Authors and Composers. The brilliant Pulitzer prize winning composer of *The Garrick Gaieties, Pal Joey, The Boys from Syracuse, Oklahoma, Carousel, King and I, South Pacific*, and *Sound of Music*, was formerly in AGAC.

"When a writer arrives at my age," said the 64-year old Rodgers, "and has achieved any stature, he really is under an obligation to support an organization like AGAC which works to help all writers."

Winner of Pulitzer-prizes for *Oklahoma* (1943) *and South Pacific* (1949), as well as numerous "Tony's" "Critics Awards" and honorary college degrees, Richard Rodgers is one of the all-time great figures in American popular music. In more than forty years of creative effort, together with his collaborators Larry Hart and Oscar Hammerstein, II, he has written many enduring theatre works, and countless songs which are now "art songs", re-recorded, sung, danced to, loved throughout the world.

He is also producer-director of the New York State Music Theatre at Lincoln Center. *Sound of Music*, the last R & H collaboration, may become the largest grossing film of all-time, exceeding even *Gone With the Wind*. And recently, the Rodgers and Hammerstein Foundation contributed $150,000 to assist the establishment of the Archives of Recorded Sound at Lincoln Center's Library and Museum of the Performing Arts.



RICHARD RODGERS
AGAC works to help all writers

"We Are Delighted," Says Lane

"We are delighted and proud that Richard Rodgers is once again with us in the American Guild of Authors and Composers," said AGAC's President Burton Lane. "The billion dollar music and recording industry, which encom-

(*Continued on Page 4*)

Writers' Alphabet

Writers in the music field have a special alphabet that sometimes requires unscrambling. Here are the organizations, listed by initials and full name, so that you may differentiate among them and know what each stands for:

AGAC — American Guild of Authors and Composers, formerly called S.P.A. (Songwriters Protective Association). We function mainly in the area of publisher-writer relations: AGAC protects your rights with respect to publication, royalties, renewals, collection of royalties, auditing. We also provide members with subsidiary services such as copyright renewal, insurance, hospitalization.

ASCAP — American Society of Composers, Authors and Publishers. A performing rights society in which writers and publishers pool their performing rights. ASCAP collects from users, and distributes to its members, payments for use of their works in T.V., Radio, Dance Halls, Taverns, etc.

BMI — Broadcast Music Incorporated. A performing rights society in which writers and publishers pool their performing rights; B.M.I. collects from users and distributes to its members, payments for use of their works in T.V., Radio, Dance Halls, Taverns, etc.

SESAC, Inc. — A performing rights society of publisher members only, who receive royalties from SESAC and share them with writers.

ACA — American Composers Alliance. A serious composers' organization which represents its members in connection with various rights in their compositions, and has an agreement with B.M.I. under which it collects royalties from B.M.I. and distributes these to its members.

CLGA — Composers and Lyricists Guild. A labor union of composers and lyricists which functions in employer-employee relations in the motion picture and T.V. fields.

SOA — Songwriters of America. This is not a formal organization. It is the group designation of the participants in a lawsuit concerned with alleged professional discrimination.

Writers may belong to only one performing rights society. All writers are urged to work through a peforming rights society. There are performing rights societies in most foreign countries, such as PRS in England, SACEM in France and GEMA in Germany.

P.S. AGAC believes in cooperating with any and all organizations in the music field which maintain the basic minimum standards set forth in our by-laws and our contracts, and our first and foremost aim is the protection of all writers of musical works from songs to symphonies. Members of some of the above organizations are also members of AGAC.

WATCH OUT FOR THIS ONE!

At least one publisher has taken a copy of our 1939 (white) contract, made a few changes, chiefly to decrease the writer's protection, and is using photocopies of this hybrid contract to sign writers. These publishers have left on the statement "Approved by SPA, 1939," and our seal and the words "Standard Uniform Popular Songwriters Contract." Naturally, we have approved nothing of the sort.

This gambit is obviously intended to fool writers into believing they are receiving genuine, current AGAC contracts. Don't *you* be fooled by this contract! Don't accept a 1939 contract. Don't accept any contract that is "doctored up." Insist upon the AGAC 1947 Standard Uniform Popular Songwriters Contract, without change. You will find that if you stand up for your rights, you will get what you want. An active publisher, who is also a writer, told us recently: "If a publisher wants your song, he will give you a proper AGAC contract. If he refuses, then he really does not care very much about your song."

WORDS WITHOUT MUSIC

By Edward Heyman

E 657

I have just returned from a short trip to London, where I had meetings with Royce Whale of P.R.S. and with Victor Knight of the Songwriters Guild which is the British counterpart of AGAC. They both said that American writers were fortunate indeed to have a Guild which did so much for them. I also met with David Heneker, the composer-lyricist of the London-New York success *Half A Sixpence* and the current London favorite *Charley G*. He hopes that in the near future the Songwriters Guild of Great Britain will be able to do only half as much as AGAC does for its members . . . And speaking of AGAC members, several of them (including two council members) are co-authors of a book published by the MacMillan Company and also at the same time by Avon Books in paperback. They are Steve Allen, Duke Ellington, Sam Cos[illegible], Hoagy Carmichael, Dorothy Fields, Johnny Mercer, and Carmen Lombardo, as told to Henry Kane. Each chapter is a profile on the writer involved and should be both entertaining and informative to AGAC members. (Title: *How To Write A Song*)

The song which was played at the airport when Pope Paul arrived in New York was *Peace And Harmony* by Gladys Shelley and Ray Ellis . . . Norman Kaye, who lives in Las Vegas, has donated the proceeds of two of his songs to the Variety Club and The March Of Dimes . . . Tibor Serley has accepted an invitation to be a resident instructor and lecturer on Contemporary Chamber Music at the Stratford Festival in Canada this coming July . . . and Jay Gorney was up in Cambridge as consultant for the famous Harvard Hasty Pudding Show . . . We all have a very attractive and generous offer from Jane Douglas White, who is the managing Director of the Gristmill Musical Playhouse in Andover, New Jersey. Any member of AGAC who identifies himself or herself by their membership card at the box office will receive 20% discount for themselves AND their party, with the sole exception of the 9 P.M. Saturday performance. The shows which have been scheduled are *Oklahoma!, Camelot, The Music Man, The King And I, Song Of Norway, Gentlemen Prefer Blondes,* and *A Funny Thing Happened On The Way To The Forum.*

Guild Collects for Widow

This may sound like something out of an early American melodrama but it is a true contemporary story. One of the nation's top rhythm and blues "big-beat" writers who wrote a good deal of material that landed in *Billboard's* Top 100—recorded by nationally known artists—has been dead for several years. His wife lives in Atlanta. She knew very little about his affairs she didn't know who was obligated to pay her royalties or if she was entitled to royalties.

She came into AGAC. AGAC's Royalty Administrator John Carter got busy. Shortly thereafter, she received a $1,000 check as an advance on account. "I believe that the estate has about $10,000 to $20,000 due in royalties earned," says John Carter.

Billy Rose

(1899-1966)

Lyricist. Together with the late George Meyer and Edgar Leslie, Billy Rose founded the Songwriters Protective Association (SPA) in 1931. He was a great fighter for the rights of songwriters and was SPA's first president. SPA is now AGAC.

Thousands of songwriters and their families lead a better life today because of the efforts of Billy Rose.

Close-Up of AGAC's Ted Livingston

E 658 70~ 3M, with AGAC

HE GOES TO BAT FOR WRITERS

"What is AGAC?" "How does it differ from ASCAP and BMI?" "What's wrong with the 'standard' white-paper contract offered by publishers?"

Practically a million of these questions, and subtler variations, are tossed each year at Theodore "Ted" Livingston. He's head of the Membership department of the American Guild of Authors and Composers. And you can find him in the right hand corner of AGAC's West 57th Street offices in New York City (formerly the executive suite of Decca Records) behind a trayful of yellow AGAC contracts and stacks of handwritten and typed notes from writers and would-be writers.

Livingston is a one-man information bureau about the complex business world of music. On the phone, and in voluminous correspondence, he frequently spells out the virtues of the writers' guild, and how AGAC differs from ASCAP and BMI. Patiently, he informs writers what the performing rights societies do (collect monies from radio, TV, etc.) and the totally different functions of AGAC in the realm of contracts, copyright renewals and royalty collections (See *Writer's Alphabet*, page 2).

"White-Paper" Contracts: "Unfair"

Livingston has to process AGAC contracts which arrive, in collaboration with Miriam Stern, AGAC's Executive Director. At the same time, he is often queried by beginning writers about the so-called "White-paper Standard Writer's" contract, so-called because it is printed on white-stock, frequently offered by music publishers. Explaining the fine small print, Livingston points out to writers that these contracts are inadequate and unfair because:

- They frequently give the publisher the right to alter the music and lyrics without asking the writer's permission (*this is not permitted in AGAC contracts*).
- There is no clause in the so-called "standard writer" contract which allows the writer to recover his song.
- The fine-print clauses in the mischeviously titled "standard writer's" contract contain a clause in which the writer actually signs away his copyright renewal rights, potentially worth thousands of dollars.

Why AGAC "Counter-Signs"

The famous AGAC contracts—actually four page Bill of Rights for Writers—protects writers in all spheres. Under the AGAC contract, the writer, for example, can recover his song if the contract has not been fulfilled (fullfillment means the securing of a commercial recording, the publishing of printed copies or a $250 advance after one year); and in AGAC contracts, the writer retains his "renewals."

If these facts are clearly printed on AGAC contracts, why is there printed in tall red letters right across the guild's contract: THIS IS NOT AN AUTHORIZED AGAC CONTRACT UNLESS IT IS COUNTER-SIGNED.

"A good question," says Livingston. "There are a lot of reasons for this. We have to check if there are any stuck-in clauses that are inconsistent with the AGAC contract. We have to check that there are no attached little agreements which the publisher has gotten the writer to sign that hurt the writer. We also check that the contract is filled out correctly as to names and signatures."



TED LIVINGSTON

Livingston added: "A writer doesn't know if he's written a dud or another *Stardust*. If he's written a standard, under the AGAC contract, after the first 28 years, the writer can renegotiate a new contract for his song. This could means $10,000 to $50,000 to a writer." In other words under the AGAC contract, the writer retains the right to re-sell his valuable copyright to the highest bidder. And if you have an important "money song", there are many bidders for valuable copyrights.

Having worked for music publishers and in the performance-rights field, Ted qualifies as "a copyright expert under the United States Government's rating of occupations." He answers all questions put to him by writers, except those that verge on personal legal advice.

Livingston was born in Los Angeles, but has lived in the East for many years. This gray-eyed veteran of the music business has been with AGAC since 1959. To Livingston the "contract" is a vital instrument "It must be respected by both parties," he says.

3 M Visits AGAC Offices

Recently, attorneys for 3 M's controversial background music project requested and received an opportunity to explain the legal and economic aspects of that company's entry into the background music business. Harold Orenstein and Allan Arrow of Orenstein, Arrow & Louria, detailed the position of the diversified corporation at an AGAC Council meeing Thursday, April 7, 1966 at AGAC's offices on West 57th Street.

President Burton Lane and the AGAC Council expressed the "fears and anxieties" of writers in the 3 M background case. Lane noted writers always want to make more money from their compositions. But the Guild believes performance rights should be secured from a performing rights organization, rather than from music publishers. AGAC does not have the forces, nor the money, nor the expertise to police usage of music on a large scale. 3 M obtains performance rights to some ASCAP compositions not from ASCAP, but from individual music publishers for periods of three years.

FIVE SUITE

am Stern, AGAC Executive Director

want to report to the members a telephone conversation I had with a publisher. The publisher is a publisher am I consider honest and whom the great majority of writers also feel is honest. As a matter of fact, he is not only honest but is frank.

I called this publisher because I had seen an extremely bad contract issued by one of his firms which is not signatory to the guild. I had no way to force a good contract for these writers because the firm with whom they placed this was not AGAC. The publisher's answer is an answer any publisher would give if he were frank. He said he would take anything a writer would give him. As he stated, "when renewals are given to me on a silver platter, of course, I will take them." As he explained to me, he is not in the business to educate writers. If the writers want to give him renewal rights, or complete control of their compositions, there is no reason why he should not take them. If a writer does not recognize what rights are rightfully his and he is willing to give them to a publisher, the publisher is not going to refuse.

Burton Lane has sent to all of you a letter in which he drew to your attention that AGAC has established rights for writers but that you yourself are responsible for seeing that these rights are not taken away from you. Certainly you should not be *giving* them away. The guild has been fighting for 35 years to obtain these rights for you.

If you make sure you get an AGAC contract everytime you place a song, you will not have to read each contract carefully to know what you have given away. It is very difficult for a layman to read the fine print of contracts and understand exactly what that fine print really means.

Often in contracts you will see that you are to be paid royalties on specific dates. However, in non-AGAC contracts, more often than not, the writer does not have the right to get his song back because the publisher has failed to pay him. In an AGAC contact you *know* you have the right. The only way to be sure you are getting everything to which you are entitled is to place your songs with publishers who are authorized to give the countersigned AGAC contract.

Don't give it away because they certainly will take it.

We're On The A... In Print

The AGAC story is getting around. Recently, AGAC President Burton Lane told about "the marvelous work" of the American Guild of Authors and Composers on the Mimi Benzell (NBC) radio program. Guesting on the Duncan McDonald (WQXR) show, Lane depicted the guild's struggles to establish a model uniform songwriters contract, and its highly successful Collection of Royalty Plan.

Computer Applications Service, a publication covering the world of automation, ran an article "Tin Pan Alley Takes to Computers" (March 1966). It was written by David Dachs, Public Relations Director of AGAC. The article spotlighted the data processing techniques pioneered by AGAC in connection with its royalty collection service. *Cash Box* (April 3) reprised highlights of the article.

A suggestion by Stan Zabka, Guild member that AGAC reach would-be writers in schools and colleges has led to AGAC's establishment of an Educational Department. The announcement that AGAC would provide speakers and information to schools received coverage in *Cash Box* and *Billboard*. *The World Telegram* ran an article on the new service on its school page (March 23) under the headline: "Schools to Hear Songwriters."

RICHARD RODGERS BACK IN AGAC (*Continued from Page* 1)

passes TV, motion pictures, night clubs, restaurants, wired-music, taped music, is based upon the work of composers and lyricists who create the raw material. We need a strong writers' guild to protect writers in this fast-moving entertainment structure. We can do things organizationally that we cannot do alone to protect the writer.

"Having Richard Rodgers with us, will add to our strength."

The return of Richard Rodgers accents a growing trend in which many former AGAC and SPA writers have returned to the guild. These include: Jack (*Happy Days Are Here Again*) Yellen, Harry (*Side By Side*) Woods, Dick (*Hot Diggity*) Manning, and lyricist Sheldon Harnick (*Fiddler On The Roof*).

Clint Ballard, head of the membership committee, also disclosed that Gary McFarland, jazz musician and composer, has entered the fold. Lyricist and short story writer Eugene "Gene" Lees has also joined. Lees had done the lyrics to many contemporary Latin-American tunes, including *Quiet Nights of Quiet Stars*.

TV'S "Man from U.N.C.L.E." Too

TV's David McCallum, the enormously popular electronic operative from the "Man from U.N.C.L.E." has joined as an associate member of the Guild. Welcome, Illya. And from the world of nightclubs, pianist-singer-writer Portia Nelson has also taken out membership in AGAC, as have many new and young writers, starting out.

A number of estates have also joined the Guild to protect important copyrights and to participate in AGAC's Collection of Royalty Plan and copyright renewal service. They include: the estate of composer Allan Roberts (co-author of *You Always Hurt The One You Love, Put The Blame on Mame*); the estate of the late Loring "Red" Nichols; the estate of Chuck Willis, and David Barbour (co-author of *It's A Good Day, I Don't Know Enough About You*).

The complete list of writers who have joined or rejoined AGAC since the preceding *Bulletin* is as follows:

EDMUND ANDERSON
NORMAN ANDRE ANDERSON
BEN J. ARRIGO
NAVERRO ARTIS
RONALD N. AXE
HENRY A. BAHR
EST. DAVID M. BARBOUR
EST. CHARLES A. BAYHA
PATRICIA BENTON
EST. JOSEPH DAVID BLAUFOX
PATRICIA A. BOWN
D. DUDLEY BRILL
LEONARD ANTHONY CASSO
RALPH CHICORELL
ETHEL GENEVIEVE DELL
SHURA DEVORINE
LOU E. DUTTON
ALFRED RICHARD FADEH
EST. CHARLES E. HATHAWAY
L. MARGUERITE HOUSE
EDWARD JOHN FEARON
JERRY FERRARA
EST. ARTHUR B. FIELDS
PHILIP FRAUM
BETTY A. FOLEY
IRVING SPENCER GOLDMAN
VERONICA J. CARLOS GOMES
CHARLES DOUGLAS GOODWIN
ANNE HABER
GEORGE HARTLEY
DORIS HIGGINSON
SADIE HOGANS
LEE HOLDRIDGE
JESSICA RACAL KAUFFMAN
ROBERT KELLEGHAN
DONALD R. KELPHART
J. FRAYSER KERSHNER III
JOSEPH D. KING
HOWARD KIRBY
JOHN E. KLEIBER
LINDSAY ROBERT KNOX
ROY LACEY
VERA PARKER LAWSON
EUGENE JOHN LEES
FRANK D. LOGRECO
DAVID McCALLUM
MARIE McCORMACK
GARY McFARLAND
FREDERIC FORTESQUE MANLEY
ROBERT MARCUS
JOHN MARSI
DENNIS G. MEACHAM
PORTIA NELSON
EST. LORING "RED" NICHOLS
HUGO WILLIAM OBERG
EST. FRANCIS K. O'MALLEY
MR. POTT
PHILIP RAMONE
SHERMAN W. REID, JR.
RENNY REVEL
MAX RICH
SOL RICH
EST. ALLAN ROBERTS
WILLIAM TOWLER ROBEY
RICHARD RODGERS
CHARLES W. SMITH
WILLIAM CHARLES SOLLY
CHRISTOPHER L. STONE
TOM WAYNE SWAYZEE
FRANCIS FINK TAYLOR
MITCH THOMAS
JOSEPHINE TROVATO
EST. A. RAYMOND TURNS
MARK UZELEVSKY
TEDDY VANN
ROBERT NICHOLS WILLIAMS
EST. CLARENCE WILLIAMS
EST. HAROLD "CHUCK" WILLIS

E 660

CBS v. ASCAP

Plaintiff's Exhibit No. 839

Music Study, Summaries of Transactions, Songs and Plays of All Performances for 17 ASCAP Publisher Groups.

E 661

10/7/70 to 10/10/70

PUBLISHER GROUP REPORTS — ALL PERFORMANCES OCT.70 SURVEY — RPT# 0101-3401 — PAGE # 0001
RUN DATE-03/21/74
THU MAR 21 TIME-10:45:04

MEMBER NAME	MEM.CODE	SOC.	GROUP	TRANSACTIONS	SONGS	PLAYS	CREDITS
ABERBACH GROUP	0000000	01	01	1	1	1	102.71292
BREGMAN GROUP	0000000	01	03	10	5	10	1,804.46336
CHAPPELL	0000000	01	04	14	24	33	5,987.04263
ESSEX GROUP	0000000	01	05	2	2	2	323.45991
FAMOUS GROUP	0000000	01	06	7	9	11	3,206.09366
BIG THREE GROUP	0000000	01	07	13	22	22	6,218.59469
SAM FOX GROUP	0000000	01	08	1	3	3	489.70942
LEEDS GROUP	0000000	01	09	6	10	16	1,799.68627
MILLS GROUP	0000000	01	10	3	3	3	487.18288
MORRIS GROUP	0000000	01	11	3	7	7	2,736.24823
SHAPIRO GROUP	0000000	01	12	8	10	12	2,004.65912
SHAYNE GROUP	0000000	01	13	1	12	17	3,111.57779
WARNER GROUP	0000000	01	14	13	59	71	12,767.32091
VOGEL GROUP	0000000	01	15	3	3	3	709.85943
FRANK GROUP	0000000	01	16	2	3	5	512.95727
IRVING BERLIN GROUP	0000000	01	17	3	2	3	1,403.20243
SUB TOTAL				90	175	219	43,670.17092
ALL OTHERS							42,260.35215
TOTAL **							85,930.52307

E 662

1/3/71 to 1/3/71

E 663

MEMBER NAME	MEM.CODE	SOC.	GROUP	TRANSACTIONS	SONGS	PLAYS	CREDITS
ABERBACH GROUP	0000000	01	01	1	1	1	2.32654
BREGMAN GROUP	0000000	01	03	8	3	8	905.53671
CHAPPELL	0000000	01	04	14	14	19	3,786.54556
ESSEX GROUP	0000000	01	05	1	1	1	536.03364
FAMOUS GROUP	0000000	01	06	7	11	11	1,487.49597
BIG THREE GROUP	0000000	01	07	14	20	21	4,153.55302
SAM FOX GROUP	0000000	01	08	1	1	1	536.03364
LEEDS GROUP	0000000	01	09	5	5	6	799.83096
MILLS GROUP	0000000	01	10	3	3	3	1,131.65535
SHAPIRO GROUP	0000000	01	12	5	7	8	3,453.48759
WARNER GROUP	0000000	01	14	14	45	51	11,085.88712
VOGEL GROUP	0000000	01	15	1	1	1	134.00841
FRANK GROUP	0000000	01	16	2	3	3	1,340.08410
IRVING BERLIN GROUP	0000000	01	17	1	3	3	566.79525
SUB TOTAL				77	118	137	29,919.27386
ALL OTHERS							49,008.12923
TOTAL **							78,927.40309

5/2/71 to 5/8/71

E 665

MEMBER NAME	MEM.CODE	SOC.	GROUP	TRANSACTIONS	SONGS	PLAYS	CREDITS
BREGMAN GROUP	0000000	01	03	3	3	8	960.41280
CHAPPELL	0000000	01	04	12	19	24	6,603.26976
ESSEX GROUP	0000000	01	05	4	4	4	654.55680
FAMOUS GROUP	0000000	01	06	8	13	19	6,350.72000
BIG THREE GROUP	0000000	01	07	10	14	15	3,525.92640
SAM FOX GROUP	0000000	01	08	3	5	5	1,233.26720
LEEDS GROUP	0000000	01	09	6	8	8	3,537.97507
MILLS GROUP	0000000	01	10	5	8	8	3,256.75200
MORRIS GROUP	0000000	01	11	2	7	7	2,717.59520
SHAPIRO GROUP	0000000	01	12	2	2	2	1,178.90560
WARNER GROUP	0000000	01	14	18	50	57	14,456.91751
VOGEL GROUP	0000000	01	15	2	2	2	702.14400
FRANK GROUP	0000000	01	16	2	3	3	1,768.35840
IRVING BERLIN GROUP	0000000	01	17	4	4	4	1,759.27040
SUB TOTAL				86	142	166	48,706.07114
ALL OTHERS							47,287.79836
TOTAL **							95,993.86950

E 666

9/5/71 to 9/11/71

E 667

MEMBER NAME	MEM.CODE	SOC.	GROUP	TRANSACTIONS	SONGS	PLAYS	CREDITS
BREGMAN GROUP	0000000	01	03	9	7	15	2,367.96924
CHAPPELL	0000000	01	04	11	16	21	2,744.66192
ESSEX GROUP	0000000	01	05	1	1	1	14.53816
FAMOUS GROUP	0000000	01	06	2	5	5	1,459.56720
BIG THREE GROUP	0000000	01	07	3	6	6	1,374.07725
LEEDS GROUP	0000000	01	09	5	6	7	4,900.29176
MILLS GROUP	0000000	01	10	1	1	1	670.50256
MORRIS GROUP	0000000	01	11	1	2	2	961.52056
SHAPIRO GROUP	0000000	01	12	4	4	4	2,244.21652
SHAYNE GROUP	0000000	01	13	1	1	1	670.50256
WARNER GROUP	0000000	01	14	13	39	47	10,975.89611
FRANK GROUP	0000000	01	16	2	2	2	694.50836
IRVING BERLIN GROUP	0000000	01	17	2	2	2	828.02720
SUB TOTAL				55	92	114	29,906.27940
ALL OTHERS							38,665.17623
TOTAL **							68,571.45563

999

1/1/72 to 3/31/71

E 669

MEMBER NAME	MEM.CODE	SOC.	GROUP	TRANSACTIONS	SONGS	PLAYS	CREDITS
ABERBACH GROUP	0000000	01	01	7	14	21	8,862.19920
BREGMAN GROUP	0000000	01	03	118	24	166	23,575.04346
CHAPPELL	0000000	01	04	181	143	252	69,223.63705
ESSEX GROUP	0000000	01	05	26	15	28	5,212.01462
FAMOUS GROUP	0000000	01	06	82	79	228	52,716.58918
BIG THREE GROUP	0000000	01	07	130	163	277	122,722.26386
SAM FOX GROUP	0000000	01	08	31	42	46	7,054.15616
LEEDS GROUP	0000000	01	09	66	48	114	23,563.00732
MILLS GROUP	0000000	01	10	35	37	40	13,539.19424
MORRIS GROUP	0000000	01	11	7	7	9	2,245.20520
SHAPIRO GROUP	0000000	01	12	38	37	51	19,223.83971
SHAYNE GROUP	0000000	01	13	12	7	14	1,365.35870
WARNER GROUP	0000000	01	14	140	256	444	116,979.24601
VOGEL GROUP	0000000	01	15	11	9	13	2,807.78004
FRANK GROUP	0000000	01	16	35	24	40	14,116.94048
IRVING BERLIN GROUP	0000000	01	17	24	19	30	11,164.78872
SUB TOTAL				893	924	1773	494,371.26793
ALL OTHERS							538,675.54681
TOTAL **							1,033,046.81474

E 670

E 671

CBS v. ASCAP

Plaintiff's Exhibit No. 840

Music Study, Summaries of Transactions, Songs and Plays of Feature and Qualifying Performances for 17 ASCAP Publisher Groups.

10/4/70 to

E 672

07/10/70

PUBLISHER GROUP REPORTS — FEATURE AND QUALIFYING PERFORMANCES OCT.70 SURVEY RPT# 0101-3401 — PAGE # 0001 — RUN DATE-03/21 — TIME-10:42:52

THU MAR 21

MEMBER NAME	MEM.CODE	SOC.	GROUP	TRANSACTIONS	SONGS	PLAYS	CREDITS
ABERBACH GROUP	0000000	01	01	1	1	1	102.71292
BREGMAN GROUP	0000000	01	03	4	4	4	1,504.21761
CHAPPELL	0000000	01	04	12	22	27	5,895.93679
ESSEX GROUP	0000000	01	05	2	2	2	328.45991
FAMOUS GROUP	0000000	01	06	5	7	9	2,386.09707
BIG THREE GROUP	0000000	01	07	11	17	17	5,104.25610
SAM FOX GROUP	0000000	01	08	1	3	3	489.70942
LEEDS GROUP	0000000	01	09	6	10	16	1,799.68627
MILLS GROUP	0000000	01	10	3	3	3	487.18288
MORRIS GROUP	0000000	01	11	3	7	7	2,736.24823
SHAPIRO GROUP	0000000	01	12	6	8	8	1,784.56223
SHAYNE GROUP	0000000	01	13	1	5	8	1,785.61369
WARNER GROUP	0000000	01	14	13	39	44	10,351.61443
VOGEL GROUP	0000000	01	15	3	3	3	709.85943
FRANK GROUP	0000000	01	16	2	3	4	507.10387
IRVING BERLIN GROUP	0000000	01	17	3	2	3	1,403.20243
SUB TOTAL				76	136	159	37,376.46328
ALL OTHERS							29,569.35477
TOTAL **							66,945.81805

678

E 674

1/3/71 to 1/9/71

PUBLISHER GROUP REPORTS — FEATURE AND QUALIFYING PERFORMANCES JAN.71 SURVEY RPT# 0101-3401 — PAGE # 0001
RUN DATE-03/21/74
THU MAR 21 — TIME-10:05:34

MEMBER NAME	MEM.CODE	SOC.	GROUP	TRANSACTIONS	SONGS	PLAYS	CREDITS
FREEDMAN GROUP	0000000	01	03	1	1	1	536.03364
CHAPPELL	0000000	01	04	10	12	12	3,690.00631
ESSEX GROUP	0000000	01	05	1	1	1	536.03364
FAMOUS GROUP	0000000	01	06	4	4	4	679.83129
BIG THREE GROUP	0000000	01	07	10	13	14	3,501.79741
SAM FOX GROUP	0000000	01	08	1	1	1	536.03364
LEEDS GROUP	0000000	01	09	2	2	2	775.79145
MILLS GROUP	0000000	01	10	3	3	3	1,131.65535
SHAPIRO GROUP	0000000	01	12	4	6	6	2,[illegible].74529
WARNER GROUP	0000000	01	14	14	30	33	9,77[illegible].06120
VOGEL GROUP	0000000	01	15	1	1	1	134.00841
FRANK GROUP	0000000	01	16	2	3	3	1,340.08410
IRVING BERLIN GROUP	0000000	01	17	1	3	3	566.79525
SUB TOTAL				53	80	84	25,426.87698
ALL OTHERS							38,484.71811
TOTAL **							63,911.59509

E 675

5/2/71 to 5/8/71

E 676

MEMBER NAME	MEM.CODE	SOC.	GROUP	TRANSACTIONS	SONGS	PLAYS	CREDITS
BREGMAN GROUP	0000000	01	03	2	1	2	589.45280
CHAPPELL	0000000	01	04	8	16	17	6,507.07136
ESSEX GROUP	0000000	01	05	3	3	3	649.44000
FAMOUS GROUP	0000000	01	06	7	10	12	3,850.85120
BIG THREE GROUP	0000000	01	07	9	11	12	2,895.52640
SAM FOX GROUP	0000000	01	08	2	2	2	1,178.90560
LEEDS GROUP	0000000	01	09	6	8	8	3,537.97507
MILLS GROUP	0000000	01	10	5	8	8	3,256.75200
NORRIS GROUP	0000000	01	11	2	7	7	2,717.59520
SHAPIRO GROUP	0000000	01	12	2	2	2	1,178.90560
WARNER GROUP	0000000	01	14	18	35	37	12,623.67591
VOGEL GROUP	0000000	01	15	2	2	2	702.14400
FRANK GROUP	0000000	01	16	2	3	3	1,768.35840
IRVING BERLIN GROUP	0000000	01	17	4	4	4	1,759.27040
SUB TOTAL				72	112	119	43,215.92394
ALL OTHERS							31,451.05280
TOTAL **							74,666.97674

9/5/71 to 9/11/71

E 678

MEMBER NAME	MEM.CODE	SCC.	GROUP	TRANSACTIONS	SONGS	PLAYS	CREDITS
BREGMAN GROUP	0000000	01	03	2	2	2	996.74120
CHAPPELL	0000000	01	04	8	14	15	2,607.89256
ESSEX GROUP	0000000	01	05	1	1	1	14.53816
FAMOUS GROUP	0000000	01	06	1	1	1	577.41320
BIG THREE GROUP	0000000	01	08	2	3	3	656.99725
LEEDS GROUP	0000000	01	09	3	3	4	1,862.86100
MILLS GROUP	0000000	01	10	1	1	1	670.50256
MORRIS GROUP	0000000	01	11	1	2	2	961.52056
SHAPIRO GROUP	0000000	01	12	4	4	4	2,244.21652
SPAYNE GROUP	0000000	01	13	1	1	1	670.50256
WARNER GROUP	0000000	01	14	12	29	34	10,058.51783
FRANK GROUP	0000000	01	16	1	1	1	670.50256
IRVING BERLIN GROUP	0000000	01	17	2	2	2	828.02720
SUB TOTAL				39	64	71	22,820.23316
ALL OTHERS							19,959.15437
TOTAL **							42,779.38753

1/1/72 to 3/31/72

E 680

PUBLISHER GROUP REPORTS — FEATURE AND QUALIFYING PERFORMANCES JAN.72 SURVEY RPT# 0101-3401 — PAGE # 0001
RUN DATE-03/21/
THU MAR 21 — TIME-10:13:39

MEMBER NAME	MEM.CODE	SOC.	GROUP	TRANSACTIONS	SONGS	PLAYS	CREDITS
ABERBACH GROUP	0000000	01	01	7	14	16	8,543.57344
BREGMAN GROUP	0000000	01	03	24	19	28	9,109.77442
CHAPPELL	0000000	01	04	86	126	168	67,892.46709
ESSEX GROUP	0000000	01	05	15	12	16	5,080.98846
FAMOUS GROUP	0000000	01	06	51	54	86	29,362.99246
BIG THREE GROUP	0000000	01	07	97	115	156	78,253.03080
SAM FOX GROUP	0000000	01	08	18	16	18	6,028.07092
LEEDS GROUP	0000000	01	09	37	32	46	14,845.81364
MILLS GROUP	0000000	01	10	31	30	33	13,507.50944
MORRIS GROUP	0000000	01	11	7	7	9	2,245.20920
SHAPIRO GROUP	0000000	01	12	38	36	49	17,709.72283
SHAYNE GROUP	0000000	01	13	8	4	8	1,303.45847
WARNER GROUP	0000000	01	14	137	183	297	94,533.63210
VOGEL GROUP	0000000	01	15	11	9	13	2,807.78004
FRANK GROUP	0000000	01	16	29	22	34	14,041.39880
IRVING BERLIN GROUP	0000000	01	17	24	19	30	11,164.78872
SUB TOTAL				620	698	1009	376,430.21083
ALL OTHERS							361,445.1346.
TOTAL **							737,875.34550

E 681

E 682

CBS v. ASCAP

Plaintiff's Exhibit No. 866

Draft, dated 11/1/65 of 3MPX 27.

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

MAY 1973

E 683

PX
866/d

November 1, 196

Dear Publisher:

We are writing this to you as a publisher who is or was a signatory to the AGAC Basic Agreement, and has contracts with members of this organization on the AGAC form.

This is written with respect to the background music project of Minnesota Mining And Manufacturing Co. ("3M"), in which they are selling a tape cartridge playback machine, and tapes containing 700 compositions each. We note that they are paying, for each composition per tape, a mechanical royalty of 2 cents; and a performance royalty of 3 cents for three years. Undoubtedly, 3M has given you information on this project, to induce you to sign a contract with them, and you may be one of the publishers who has done so or is conterplating doing so.

We believe it is of vital importance to let you know how this organization, on behalf of our members, feels about certain aspects of this enterprise.

You will note that the AGAC contract (both the 1947 form and the 1939 form) calls for your obtaining the writer's consent, if you wish to enter into a bulk or block license (except under circumstances specified in the contract) or to grant any license of a nature not granted prior to June 1, 1937. For the particulars of these provisions, please see the following paragraphs: Paragraph 4 (j)

of the 1947 contract, and 4 (k) of the 1939 contract, which refer to bulk of block licenses; and paragraph 4 (l) of the 1947 contract and 4 (l) of the 1939 contract, which refer to licenses for use by any means, or for any purposes not commercially established, or for which licenses were not granted by the publisher prior to June 1, 1937.

In our opinion, the agreement (as we know of it) which a publisher signs with 3M for use of his catalogue, is a bulk or block license and, further, the license is for uses by means and for purposes not commercially established, and for which licenses were not granted by the publisher prior to June 1, 1937, so that such license, without the writer's written consent, is a violation of the contract.

We call this to your attention not only as a legal matter, but as a matter of responsible good faith and fair dealing between yourself and your writers.

These contractual provisions are not meaningless words to be lightly ignored or evaded. These licenses, referred to in these paragraphs, are not a licensing as publishers and writers have known it. It is the intent of these paragraphs that the writer shall be fully informed and shall have a voice in deciding whether such new licenses should be granted, and if so, on what terms, and so that all aspects of the matter might be considered. In the adoption of these paragraphs, Music Publishers Protective Association (M.P.P.A.) with whom these contract forms were negotiated, as well as our organization, felt that the views of the writers must be sought and their consent obtained for any new uses which might so seriously affect writers, publishers, and indeed the music industry as a whole. Such

request for consent is to be a genuine consultation, not just a formality or a means of "selling" a writer because the publisher has been "sold" by someone else. Some publishers, in requesting writers to consent to the 3M agreement, have taken just such a high-pressure attitude.

For one thing, we are greatly concerned with the situation regarding the performing licenses.

The performing royalty paid by 3M covers a period of three years. This may well turn out to be a perpetual license, because we see nothing to prevent buyers of the tapes from using them after the three years. The expense and trouble of proper "policing" by publishers of buyers to make sure they do not freely use these tapes after that time, can be so great that policing will not take place. For this reason we also see nothing to prevent buyers from violating the other restrictions contained in their agreements with 3M. These perpetual and unrestricted performances will, in our opinion, be another "juke box exemption."

The sale and use of these tapes may seriously reduce the performing royalties that publishers and writers are now receiving from leased wired music service (such as Muzak). Although many buyers of these tapes will be places that have not previously had wired music, we think that many places which now lease wired music may give it up and buy the tapes instead.

A most disturbing element of this situation, in our view, is that 3M is dealing, for performing licenses, directly with ASCAP publishers, in place of their performing rights society. We refer to ASCAP publishers only, because BMI has entered into an agreement

A most disturbing element of this situation, in our view is that 3 M is dealing, for performing licenses, directly with ASCAP publishers ignoring completely the writers individually and the performing rights society of which the writers are members. (We refer to ASCAP publishers only, because BMI has entered into an agreement

with BM.) Although, under the consent decree of the United States court which applies to ASCAP, ASCAP's rights are non-exclusive, we are certain that publishers and writers can best preserve the value of their performing rights by permitting their particular performing rights organizations to handle these rights rather than to grant separate "piecemeal" licenses. It is our conviction that although publishers have the legal right to deal in this manner (subject to the writers' consent for certain types of licenses, as mentioned above), in doing so they are extremely unwise and will ultimately injure their writers and themselves. Further, in doing so they are demonstrating a woeful lack of regard for the customary loyalty and good will of songwriters to their performing rights organizations. We believe, likewise, that large users of performing rights are not recognizing the legitimate interests of the writers, who create the continuing product upon which these users depend, when they do anything which may result in "undercutting" the performing rights societies. It is only by full cooperation and genuine bargaining on all sides that the needs of both creators and users are fulfilled.

The established, modern and most practicable method for performance royalties to be fixed, is by negotiation between public performance organizations and users. This is the practice in all countries of the world (except those countries behind the Iron Curtain and countries which are too new to have created such organizations). Performing rights societies were formed because they collectively and effectively check upon users in order to be informed as to who is

with 3 M.) Although, under the consent decree of the United States court which applies to ~~the~~ A SCAP, ASCAP's rights are non-exclusive, The publishers must not exercise their reserved right except with the concurrence of the particular writers. Further, by by-passing the writers they are demonstrating a woeful lack of regard for the customary loyalty and good-will of ~~x~~ songwriters. We believe, likewise, that large users of performing rights are not recognizing the legal rights of the writers. It is only by full cooperation and genuine bargaining on all sides that the needs of both creators and users are fulfilled.

publicly performing music, license users, collect and process royalties, and proceed against unauthorized users of protected music for infringement. Worldwide experience has proven that in the long run the performing interests of publishers and writers, and even of fair-minded users, are preserved and enhanced only by the operation of performing rights organizations.

The performing rate being paid by 3M seems to us to be a low one and not as high as the fees paid by the wired music services to the performing rights societies. Particularly since it appears that the number of places using wired music will increase because of the competition from 3M and similar enterprises, publishers must be alert to weigh all factors carefully, as agreements which they sign now may ultimately result in lower performing returns as a whole from background music.

With respect to the mechanical royalty paid by 3M, we suggest you give thought to whether this is a fair and adequate rate for tapes intended for public performance for years in very many places, if you license this "mechanical-performance package" (which is not a statutory compulsory license). We urge you to carefully consider whether the extensiveness of this use does not justify your demanding a higher rate for the package, so that your writers (if they consent to the licensing) will not be receiving a royalty which is too low for the scope and nature of the use for which these tapes are produced.

We would hope that 3M, a foremost, creative corporation, in evolving its music project, would take cognizance of the ~~established business structure upon which the writers whose product it requires,~~ depend. We would hope that this great company would not ignore the golden rule of fair dealing, conducting itself toward others as it would desire others to conduct themselves in return.

You, in turn, must practice the golden rule in your relations with your writers.

~~Finally,~~ we must point out the following: If you have entered or will enter into an agreement with 3M or any other similar enterprise, then in all likelihood the statements which you send to us and the royalty payments which you make to us, on behalf of our members concerned, will reflect these payments received by you. Under the circumstances, please take notice that the receipt of these statements and "tape royalties," by us and the writers, is not to be considered as a consent by the particular members to your entering into agreements with 3M or any other company which permit such production of tapes and such performances, nor any admission whatsoever against interest by ourselves or the members, and the members (whose royalty-collection representative we are), ~~nevertheless~~ reserve each and all of their legal rights to take any action against you by reason of your having entered into such agreements without their express written consent in each case, ~~upon the basis of sufficient information given to them.~~

Sincerely yours,

Burton Lane
President

We would hope that 3 M, a foremost, creative corporation, in evolving its music project, would take cognizance of the rights of writers whose creative product it requires, quite apart from the legal rights of the writers. We would hope that this great company would not ignore the golden rule of fair dealing, conducting itself toward others as it would desire others to conduct themselves in return.

You, in turn, must practice the golden rule in your relations with your writers.

If you have entered or will enter into an agreement with 3 M or any other similar enterprise, then in all likelihood the statements which you send to us and the royalty payments which you make to us, on behalf of our members concerned, will reflect these payments received by you. Under the circumstances, please take notice that the receipt of these statements and "tape royalties," by us and the writers, is not to be considered as a consent by the particular members to your entering into agreements with 3 M or any other company which permits such production of tapes and such performances, nor any admission whatsoever against interest by ourselves or the members, and the members (whose royalty-collection respresentative we are.) We take this opportunity to put you on notice that the writers reserve each and all of their legal rights to take any action against you by reason of your having entered into such agreement s without their express writer's consent in each case.

Sincerely yours,

Burton Lane
President

CBS v. ASCAP

Plaintiffs' Exhibit No. 899

Respondent's Conditional offer of Proof, 4/17/62, U.S. v. ASCAP (Shenandoah).

TX 899
E 693

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Defendant-Respondent.

CIVIL ACTION NO. 13-95

In the Matter of the Application

of

SHENANDOAH VALLEY BROADCASTING, INC., et al.,

Petitioners,

For the Determination of Reasonable License Fees.

In the Matter of the Application

of

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC. and WXYZ, INC.,

Petitioners,

For the Determination of Reasonable License Fees.

In the Matter of the Application

of

COLUMBIA BROADCASTING SYSTEM, INC.,

Petitioner,

For the Determination of a Reasonable Fee for a License to Perform Publicly by Television Broadcasting on its Local Stations Any, Some or All of the Musical Compositions in the Repertory of American Society of Composers, Authors and Publishers.

In the Matter of the Application

of

COLUMBIA BROADCASTING SYSTEM, INC.,

Petitioner,

For the Determination of a Reasonable Fee for a License to Perform Publicly by Television Broadcasting on its Network Any, Some or All of the Musical Compositions in the Repertory of American Society of Composers Authors and Publishers.

E 694

In the Matter of the Application

of

NATIONAL BROADCASTING COMPANY, INC.,

Applicant,

For the Determination of Reasonable License Fees for Its Television Broadcasting Stations.

In the Matter of the Application

of

NATIONAL BROADCASTING COMPANY, INC.,

Applicant,

For the Determination of Reasonable License Fees for Its Television Network.

RESPONDENT S CONDITIONAL OFFER OF PROOF

Preliminary Statement

Respondent, the American Society of Composers, Authors and Publishers ("ASCAP" or the "Society"), submits that petitioners are not entitled, under the Amended Final Judgment entered herein in 1950, to the type of license they are here seeking. Respondent submits that the language

of the Judgment is clear and unambiguous, and that the Court should not look beyond that language in rejecting petitioners' claim.

If, however, this Court or any reviewing Court should conclude that facts outside the language of the Judgment are relevant to its interpretation, respondent offers to introduce the following proof to establish that petitioners are not entitled to the type of license that they demand in this proceeding.

Summary

(A) Before the organization of ASCAP in 1914, there was no effective method by which writers and publishers of music could secure payment for the use of their copyrighted musical works in public performances for profit. The users of music were so numerous and widespread that no individual writer or publisher could take the measures necessary to negotiate licenses with them or to secure legal redress for unauthorized uses. Moreover, music users who wished to perform many works and to pay for such performances had no practical means of obtaining licenses from the owners of the thousands of copyrighted works that the users performed each year.

As a means of solving the problems of both the copyright owners and the users of music, and in order to ensure the free flow of music to the public, ASCAP was organized in 1914 as a non-profit, unincorporated membership association representing both writers and publishers, who grant to ASCAP a non-exclusive right to license the public performance of copyrighted musical

works that they have composed or published. The Society's revenues are divided equally between writers and publishers (after deductions for costs and expenses and payments to foreign societies for performances of works of foreign authorship by the Society's licensees). Distributions to the Society's members are in accordance with the Consent Judgments entered herein on March 14, 1950 and January 7, 1960, respectively.

Today ASCAP has over 6,000 writer members and almost 2,000 publisher members. It licenses over 30,000 enterprises located throughout the United States, including all the television and radio networks and over 500 commercial television stations and 4,000 radio stations. The television networks and almost all the television stations hold blanket licenses from the Society, entitling them to use all the works in the Society's repertory on any program they present. (Submitted herewith as Exhibits 1 and 2, respectively, are copies of the existing television network and local station blanket license agreements.) These licenses obviate, for both the user and the copyright owner, the countless complex and expensive individual negotiations that would otherwise be required.

(B) The present type of blanket license held by petitioners was painstakingly negotiated between the Society and the broadcasting industry (including the National Association of Broadcasters ("NAB")) in 1949 for the period 1949 through 1953. The telecasters insisted that they needed a broad grant of rights for their programming needs. In resolution of these negotiations, the Society's members were induced to enlarge their grants of television rights to the Society in order to accommodate those needs.

The type of blanket license negotiated in 1[illegible] was renewed after lengthy negotiations with the television industry (including the National Association of Broadcasters) for the period 1954-1957, and again for the period 1958-1961.

(C) The petitioners now seek to compel ASCAP to grant licenses that would exclude from their coverage all programs pre-recorded by others, production of which is commenced after February 28, 1962.

If the Society were compelled to grant petitioners the type of license they here seek, the very chaos that is avoided by the existence of an organization such as the Society would ensue. The many thousands of writers and publishers who license the performing rights in their works through an organization such as the Society would be required to negotiate on an individual basis with the hundreds of individuals and organizations engaged in the production of pre-recorded materials for television. Individual writers and publishers would also have to negotiate with television stations performing their works in instances where the producers had not obtained performing rights, and they would have to arrange means of detecting and prosecuting unauthorized television performances of their works.

Under the Copyright Act, owners of copyrighted musical compositions hold separate and distinct rights in their works for (i) recordation and (ii) public performances for profit. In contrast to the very simple arrangements now required for the granting of the right to record musical works on films or other material intended for television broadcasting, (such grants being made to the producers by the owners of such separate rights, but often for nominal sums in order to earn royalties for performing rights if and when the works are used on television stations), it would be necessary to have extensive, costly, and fundamentally uninformed negotiations in order to determine fees for petitioners' future, and very

[illegible] use of the music contained in pre-recorded programs.

Producers, unless they are affiliated in common ownership with telecasters, rarely know whether, and the extent to which, their programs will actually be presented by petitioners and other telecasters.

A large amount of television program material is produced abroad where the United States performing rights for works written by Americans generally cannot be acquired because the creators of those works, who usually have no means of marketing rights in foreign countries, retain their rights for United States performances. Producers of films or other pre-recorded materials made abroad usually acquire only the right to record or synchronize the music recorded in such materials. They often do not even supply cue sheets or other listings of the musical works contained in their programs.

Unlike literary material, musical works are uniquely susceptible of multiple uses in pre-recorded materials wholly different from that in which the works may have first appeared. Background or featured musical works in such pre-recorded materials are often independently created by someone wholly unknown to the producer of the program, thereby making negotiations between the two parties particularly difficult.

In many instances, producers of material pre-recorded for television use are organized on a limited budget basis for a single series, and go out of existence before the series is presented by petitioners and other telecasters. Such producers, and many others, have neither the knowledge nor the resources necessary for the negotiation of a fair and appropriate performing fee for the works they pre-record.

At the same time, while petitioners seek to impose these impossible negotiating burdens on independent

program producers and copyright owners, petitioners seek to retain, for the programs they produce themselves, the essential administrative convenience and expedition provided by central music clearance through the Society.

(D) Today, since almost all telecasters have blanket licenses permitting them to perform any musical work of a member of the Society on any program they present, it is not necessary for the Society or its members to police the specific uses of their works on such stations. For purposes of distribution, it conducts a scien fic sampling of less than 2% of the locally-emanating programs of television stations. Administration of the type of license here sought by petitioners would require ASCAP ultimately to police practically all the programs presented by petitioners and other telecasters. Pre-recorded programs account for about 70% of the locally-originating program material telecast by petitioners.

This policing operation would be an enormous and prohibitively expensive operation, particularly since most television stations have indicated that they do not maintain regular records of the musical works they perform. (See, e.g., a recent release by the Texas Association of Broadcasters ("TAB"), of which a number of petitioners are members, in response to a program-logging inquiry by Judge John E. McGeehan. Copies of Judge McGeehan's letter to the broadcasters and the release by TAB are submitted herewith as Exhibits 3 and 4, respectively. See also excerpts from letters sent by radio and television broadcasters to Judge McGeehan, set forth on pp. 12-14 of the "Report of John E. McGeehan to December 31, 1961", filed in United States v. ASCAP. A copy of pertinent extracts is submitted herewith as Exhibit 5.) It would be necessary for the Society to make tapes for

monitoring of countless hours of television programming to safeguard against infringements by petitioners.

(E) Under Section V of the Amended Final Judgment entered herein on March 14, 1950, a manufacturer, producer or distributor of a transcription or recordation of a composition in ASCAP's repertory, which is recorded for performance on specified commercially sponsored radio or television programs, has the option of clearing through ASCAP the radio or television performing rights for the performance of such composition on stations enumerated by the license applicant, thereby eliminating the need for separate licenses for such performances by the enumerated stations.

Petitioners and all other television stations receive the benefit of this option under Section 5(H) of the local station blanket license, which provides that if performance rights for pre-recorded programs are obtained from ASCAP by a program producer, televisio stations designated by the producer in his license application are relieved from paying fees to ASCAP on revenues attributable to those programs. (See Section 5(H) of the existing local television station blanket license.) (Exhibit 2)

If petitioners' application is granted, the present option of program producers to "clear at the source" will be turned into a compulsion. They will be compelled, under implicit threat of an industry-wide boycott by telecasters, to pay for petitioners' right to use the music in pre-recorded programs.

(F) In recent years, in anticipation of this proceeding, the entire broadcasting industry, acting collectively through its wholly-owned subsidiary and captive music source, Broadcast Music, Inc. ("BMI"), has undertaken a vigorous and successful campaign to engross a substantial segment of the market for the performance of music on television.

The broadcasting industry, through BMI, has carried out this campaign by inducing large numbers of former ASCAP members who specialize in writing background and theme music for television programs to resign from ASCAP and to license their works through BMI in return for substantial, long-term guarantees. These guarantees are given without regard to the amount or quality of the music that may thereafter be written by the guarantee recipients, and whether or not such music is used.

At the same time, the broadcasting industry, through BMI, has given very substantial subsidies, in varying forms, to a number of the leading producers of television programs in exchange for their agreements to use specified minimum amounts of BMI music in the programs they produce for petitioners' use.

Having obtained the works of many successful background music writers and having tied up a substantial portion of the current television series and the means of controlling the music on future series through subsidy arrangements with program producers, petitioners and other broadcasters would be able to place music writers

and publishers whose works are not controlled by the broadcasting industry at an impossible competitive disadvantage if payment for their performing rights were required to be obtained by them, on an individual basis, directly from the producers of television programs, rather than by the Society from the television stations that use those programs. Individual ASCAP members would then face the impossible negotiating task of persuading program producers to pay out money to them for the right to include ASCAP music in their programs, when the producers and their personnel are now taking in money from the broadcasting industry, through BMI, for including BMI music in their programs.

Under these circumstances, deliberately created by BMI's policy of long-term subsidy contracts, the producers and their personnel receive financial rewards for preferring BMI music, and they would not pay fair license fees to writers and publishers not sponsored by BMI for the right to use their music.

I. PETITIONERS OPERATE AT AN ECONOMIC ADVANTAGE IN THEIR COLLECTIVE NEGOTIATION OF MUSIC LICENSES WITH ASCAP; THEY DOMINATE THE TELEVISION MARKET AND CONTROL OTHER MAJOR COMMUNICATIONS MEDIA.

1. Petitioners dominate the television industry:

(a) Petitioners include all three national television networks, Columbia Broadcasting System ("CBS"), National Broadcasting Company ("NBC"), and American Broadcasting Company ("ABC"), 15 of the largest television stations, which those networks own and operate directly, and 362 other commercial stations

throughout the country. An additional 34 commercial television stations that are not petitioners of record are owned or controlled by petitioners, making a total of 411 of the 500-odd commercial television stations in the United States.

(b) The three networks (including their owned and operated stations) and 15 groups of other petitioner stations which are affiliated in common ownership and have estimated annual group broadcast revenues in the highest FCC classification (in excess of $8,000,000) accounted for aggregate estimated broadcast revenues of $867,681,517 in 1961 out of an estimated television industry total of $1,277,500,000 (i.e., about 68% of the total). (See Exhibit 6 submitted herewith.)

(c) The three petitioning networks have affiliation agreements with a total of 508 television stations located throughout the United States. The CBS television network is affiliated with 205 television stations; the NBC network with 212 television stations; and the ABC network with 247 television stations. (Some stations are affiliated with more than one network.) (Lists of station affiliates for each of the three television networks are set forth in Standard Rate & Data Service, Inc., Network Rates and Data, April 10, 1962, pp. 2 through 34, a copy of which is submitted herewith as Exhibit 7.)

(d) Ninety-five per cent of the petitioners are affiliates of one or more of the three networks and only 5% are unaffiliated with any network.

(e) Eight companies that own or operate the maximum number of VHF television stations permitted by the FCC (5 stations) own or operate, in the aggregate, 40 petitioner stations. (See Exhibit 8, submitted herewith, setting forth the names of the eight companies and the television and radio stations they own or operate.)

(f) Petitioners represent 100% of broadcast revenue of the national television networks and at least 85% of broadcast revenue of all commercial television stations in the United States.

2. Petitioners are the dominant radio broadcasters, newspaper publishers and magazine publishers in the United States:

(a) Petitioners are owners of the three largest national radio networks and are affiliated in common ownership with 387 AM radio stations, which include 82% of the "dominant" stations in the radio industry--i.e., the 50,000-watt Class I, clear-channel radio stations in the United States (see "FCC Rules Regulating Radio-Television" ##3.4, 3.21 (a), 3.22 (a)). At least 330 of the 377 petitioner stations represented in this proceeding are affiliated in common ownership with AM radio stations.

(b) Petitioners (or their parent companies) own or control about 300 newspapers throughout the United States, including 57 newspapers serving the top twenty-five major metropolitan areas (which have over half the total population of the 300 United States metropolitan markets). (See Exhibit 9 submitted herewith.)

(c) Petitioners are also affiliated in common ownership with at least 24 of the nation's leading magazines. (See Exhibit 10 submitted herewith.)

II. THE EXISTING LICENSES HELD BY PETITIONERS WERE CAREFULLY NEGOTIATED AND TWICE RENEWED, AND RESPONDENT'S MEMBERS WERE INDUCED TO MAKE ENLARGED GRANTS OF TELEVISION RIGHTS TO RESPONDENT ON THE BASIS OF SUCH LICENSES.

3. The proper type of blanket license was carefully worked out between the television industry and respondent in 1949. At that time, and on subsequent occasions, the television industry induced respondent's members to grant to the Society broad rights of television performance in reliance on the type of license agreement which was negotiated then and which has been in effect continuously since that time. Except for the currently applicable fee rates, the principal terms and provisions of the existing network and local station blanket license agreements between petitioners and respondent were approved by the entire broadcasting industry on October 1949 after almost a year of continuing negotiations between respondent and an All-Industry Committee of the NAB that represented the networks and most television stations.

4. All of the license agreements issued by respondent to broadcasters from 1941 through 1948 contained the following provision:

> "V. To the extent that we [ASCAP] have television rights, we hereby grant to you [broadcasters] a gratuitous license to make non-dramatic public performances for profit of the compositions licensed under said agreement of even date over such television stations as may be managed or operated by you during the term thereof, subject to the proviso, that we may cancel the license granted in this paragraph at any time upon the giving of thirty (30) days' notice to you."

5. By 1948, television had become firmly established as a commercial venture. On October 8, 1948, after several months of discussion with the Music Advisory Committee of the NAB, respondent solicited from its members authority to issue performing rights licenses to television broadcasters on the terms of the letter and enclosures submitted herewith as Exhibit 11.

6. On December 1, 1948, the Society asked the television industry to negotiate license agreements effective for one or two years commencing January 1, 1949. (A copy of that letter, which was sent to all holders of FCC television licenses, is submitted herewith as Exhibit 12.)

7. After further intensive negotiation with the NAB Music Advisory Committee covering both the blanket and per program types of license, agreement was finally reached concerning the blanket local station and network television licenses, which were approved by the NAB and others representing the entire television industry at a meeting in Washington, D.C., in September 1949. (Copies of the local station blanket television license agreement and the network blanket television license agreement approved at that time are submitted herewith as Exhibits 13 and 14, respectively.)

8. During the early stages of negotiations the representatives of the television industry insisted that they would not conclude any agreement with the Society unless it obtained from its members a broader grant of television performance rights than the Society then possessed (Exhibit 11.) To enable it to make the broader grant of rights required by the telecasting

industry, as embodied in the proposed license agreements which had previously been negotiated (Exhibits 13 and 14), the Society solicited from its members a new grant of television performance rights on the terms of the letter and enclosure submitted herewith as Exhibit 15.

9. The question of "clearance at the source" for certain pre-recorded material was raised at the inception of negotiations with the television industry and was resolved, after lengthy exploration of the relevant considerations, by the form of blanket license approved by the parties in 1949.

10. Subsequently, on March 14, 1950, the Amended Final Judgment was entered in this action, retaining present Section V(B), making "clearance at the source" by the Society expressly applicable to performances recorded in specified commercially sponsored programs, prepared for television presentation, where the manufacturer, producer or distributor thereof enumerates the stations for which such clearance is sought. Thus the option to require such clearance rested with the producer of the program.

11. Thereafter, the Society and the television industry renewed in 1954, and again in 1958, the same types of network and local station blanket television licenses as those negotiated in 1949.

III. THE TYPE OF LICENSE SOUGHT BY PETITIONERS WOULD BE WHOLLY IMPRACTICAL, AND WOULD IMPOSE ON INDEPENDENT PRODUCERS AND COPYRIGHT OWNERS THE VERY BURDENS WHICH MAKE IT NECESSARY TO LICENSE THE RIGHT OF PUBLIC PERFORMANCE THROUGH AN ORGANIZATION OF COMPOSERS, AUTHORS AND PUBLISHERS; IT WOULD CREATE AND MULTIPLY SUCH BURDENS AND WOULD THEREBY OBSTRUCT THE FREE FLOW OF MUSIC TO THE PUBLIC.

12. If independent producers were forced to acquire the right for petitioners to perform the musical works contained in pre-recorded programs, those producers would have to engage in innumerable, complex and costly individual negotiations with the thousands of respondent's members. The overall cost of such negotiations would be beyond the reach of most producers, and beyond the competence of most writers and publishers, unlike the relatively simple arrangements by which most television program producers now buy only the narrow "synchronization" or recording right employed by them. That cost would either materially increase the aggregate price of music or would materially reduce the net return on copyright properties. In the former event, producers would be deterred from using the best available music in their productions--to the clear detriment of the television-viewing public. In the latter event, musical creativity would be discouraged, equally to the detriment of the public.

13. Under the existing blanket licenses held by petitioners, respondent's music is brought to the public with the lowest possible administrative expense. The type of license sought by petitioners would multiply that expense many times for music conveyed to the public

through the vehicle of pre-recorded programs. At the same time, petitioners would preserve for themselves, for their other programs, the essential, expeditious and cost-saving service of central clearance now provided to the petitioners by the Society.

A. Contrary to the Intent of the 1950 Judgment and the Scheme of the Copyright Act, Petitioners Seek to Force Independent Program Producers to Pay for Petitioners' Use of Music.

14. Under the Federal Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq., petitioners have the sole responsibility for the content of the television programs presented by them.

15. Only the television networks and the individual stations have the power to determine (1) the type, nature, and source of material to be presented by them, (2) whether the performances to be telecast by them shall be reduced to fixed form before the actual telecast or shall be telecast simultaneously with and as direct telecasts of the original performances, and (3) the means by which, and the persons or organizations through whom, musical works shall be selected for television presentation.

16. With respect to the broadcasting of pre-recorded material which the networks or stations have chosen to present, the networks and stations have the power to determine, and do determine, which pre-recorded material shall be telecast on the channels allotted to them by the FCC. Telecasters often eliminate, edit, or otherwise alter or amend portions of pre-recorded material that they obtain from others.

17. Over 300 separate entities, other than the telecasters themselves, are engaged in producing filmed program material for presentation on television. (See pages D-8 through D-23 of the 1961-62 Broadcasting Yearbook, copies of which are submitted herewith as Exhibit 16.)

18. Producers of programs initially designed for television must design and adapt program content, including music, to the demands and specifications of the telecasting industry. The initial market for pre-recorded programs is generally presentation by the networks with possible "reruns" by local stations and, to a declining extent, initial presentation by local stations through direct syndication.

19. Independent producers have no market other than television networks or local television stations. Unlike petitioners, such producers have no monopoly grant from the Federal Government, and they have no continuing assured market for their output. Their programs reach the market only if they meet with the approval of the telecasters and satisfy the criteria prescribed by them.

20. Producers of pre-recorded programs are not required under the Copyright Act to obtain a license authorizing telecasters to perform musical works which may be included in pre-recorded programs.

21. If this Court were to direct the Society to issue the type of license requested by petitioners, which include the three national television networks and local television stations representing at least 89% of all station revenue, the combined television industry presumably intends to refuse to accept programs for which producers had not obtained

television performing rights. The television industry would thus force "clearance at the source" upon television film producers, instead of permitting each producer to retain its present option under the 1950 Judgment with respect to such clearance, even though the latter are not responsible under the Copyright Act for obtaining performing right licenses.

B. Independent Producers Have Neither The Knowledge Nor The Resources Required To Negotiate Reasonable Fees For Petitioners' Use Of Music.

22. Even if there were no artificial factors created by the broadcasting industry (through BMI and otherwise) dictating the choice of music to be used on a particular program, producers of pre-recorded programs could not compensate copyright owners fairly for the subsequent performance on television of the music recorded in their programs. In most instances, the composer, author and publisher of a musical work pre-recorded in material designed for, or capable of, television presentation do not know the extent to which that material actually will be presented. Even the producer of the material does not have this information unless the producer is affiliated with a television network or one or more television stations.

23. Before a television series goes into full scale production, a pilot is generally made at substantial expense. The outlay for music must be kept to a minimum at that point. Yet the basic musical requirements for the proposed series must be appraised and, frequently, negotiated for the entire series at that

time. Only about 10% to 12% of the pilots made in recent years have been sold, with the result that the larger producers generally will not make pilots unless they have previously received financial backing from the networks.

24. A large portion of the pilots now made are financed by the networks, which in return generally exact a profit participation in the series' sales proceeds. (See the article in "Variety," dated January 17, 1962, p. 29, a copy of which is submitted herewith as Exhibit 17.)

25. Smaller independent producers often make pilots without any certainty that they will ever be exhibited, gambling on the possibility of an initial network presentation without which it is becoming increasingly difficult to find any market for a television series.

26. Many independent producers go out of business before their films are presented by local stations, particularly since many producing entities are organized and exist only for a particular program series.

27. In recent years, many independent producers of television films have been experiencing relatively small gains and great risks. At the same time, the networks and stations, including petitioners, have been enjoying a continuing high rate of profit. (See, e.g., "Barron's," April 9, 1962, p. 3) The rate of return on investment (at original cost) for the entire television industry (the three networks, their owned and operated stations, and all other stations) has been:

29.3% return on investment in 1957
3[illegible]% return on investment in 1958
39.5% return on investment in 1959
41.2% return on investment in 1960

The rate of return on broadcast revenue (before Federal income tax) has been:

17.0% return on broadcast revenue in 1957
16.[illegible]% return on broadcast revenue in 1958
19.1% return on broadcast revenue in 1959
19.3% return on broadcast revenue in 1960

During this period, aggregate ASCAP gross receipts from the television industry, as a percentage of total television industry income, for all of the writers and publishers constituting its own membership, as well as foreign composers and authors, have declined, as follows:

8.7% in 1957
8.8% in 1958
7.5% in 1959
7.5% in 1960

(See Exhibit 18 submitted herewith.)

28. Many musical copyright owners have found it necessary to license their recording rights to producers of television programs for a nominal charge (and sometimes gratis) because a copyright owner generally has no chance of earning a fair return on his property unless he is prepared to share the producer's gamble that the work may reach the television screen and earn performance royalties.

29. Few independent program producers would be either willing or able to pay performing fees that would represent fair and adequate compensation for subsequent, and highly speculative, use by petitioners and other telecasters. They would either forego the use of music, to the extent possible, or they would use the BMI-licensed music that is now being offered to them on a subsidy basis by the broadcasting industry in its effort to destroy the bargaining ability of copyright owners who have not turned over their properties to broadcaster control. (See Section IV, Infra.)

30. The ultimate victim of the course of conduct that would result from the type of license sought by petitioners would be the public, which would be deprived of the free and unobstructed flow of the best available music to the television screen.

C. The Type of License Petitioners Seek Would Add Vast Expense For Respondent While Drastically Reducing Its Revenue.

31. If the Society were required to issue to petitioners the type of license requested by them, it would be necessary to maintain a constant central policing operation of vast scope and at great cost. No individual ASCAP member would have the means and resources to maintain surveillance over 500-odd operating commercial television stations located throughout the country.

32. The copyrighted works of ASCAP members could be easily infringed by television users, even without their knowledge or consent, if the Society's licenses did not cover all programs using ASCAP music. For example, many works of ASCAP members are recorded abroad by foreign orchestras, often without the knowledge of ASCAP members. Today, program inspection is rarely necessary since almost all television stations have blanket licenses covering all their programs.

33. Television stations often broadcast programs without checking on the musical content and without keeping records of the musical works in their programs. Consequently, as has been ascertained by Judge John E. McGeehan, stations frequently do not know the identity and ownership of the musical works in their programs and are often either unwilling or unable to ascertain this information.

34. Television stations do not submit data to the FCC indicating the identity and ownership of musical works performed on their stations and they generally do not maintain internal records of such performances. There are no public records of the musical content of programs presented by local television stations, and often no means exist of assembling records.

35. The producers of programs designed for television presentation often do not make available adequate cue sheets or other records containing information needed to ascertain the identity and ownership of the musical works contained in their programs.

36. The limits of a station's knowledge as to the musical content in its own programs are illustrated by the few television stations that are now licensed by the Society under per program licenses (a copy of which is submitted herewith as Exhibit 19). The administration of those licenses and the policing of programs for which fees have not been paid thereunder have required respondent to correspond repeatedly and in lengthy detail with the stations, with respondent's members, with foreign societies, and with others. Lack of sufficient and accurate information on the part of the stations has been responsible for fruitless, interminable and expensive inquiries.

37. The music of many pre-recorded programs is recorded in foreign countries by unknown orchestras. Telecasters generally disclaim knowledge of the identity of the music on such programs or the ownership of the performing rights therein.

38. If television stations were permitted to obtain licenses from ASCAP covering only a portion of the programs presented by them, the individual members of ASCAP whose works were performed in programs not covered by such licenses would be at the mercy of the networks and 500-odd commercial television stations in the country. Those members would have no assurance that television stations would not infringe their rights unless the Society undertook to police the programs--an enormous and costly task that the Society is not now required to undertake for stations with blanket licenses.

39. Of the programming of local station origin, approximately 70% is comprised of pre-recorded programs. Thus, approximately 70% of local (i.e., non-network) programs would be excluded ultimately from the coverage of the licenses sought by petitioners and would therefore have to be monitored by the Society in order to safeguard its members against infringing telecasts of compositions not reported or paid for by the stations and not licensed for television broadcasting.

40. The ultimate effect of the type of licenses sought by the petitioners would be to deprive the Society of revenue from about 70% of petitioners' local programming, while requiring the Society to police the content of all of such programming. Today, the Society need police only the three television stations that have per program licenses.

D. It Would Be Economically Impossible To Determine Reasonable Fees For The Type of License Sought By Petitioners.

41. Only 5% of the stations owned by petitioners are independent stations, i.e., stations which are not affiliated with one or more of the three national television networks and are therefore in full direct control of the sale of the facilities of their stations to advertisers. The remaining 95% of petitioners sell the right to deliver advertising messages over their stations either through one or more of the three national networks with which they are affiliated or through direct sales to advertisers (usually made through advertising agencies).

42. Apart from commercial messages, the program material telecast by the 95% of petitioners' stations that are network affiliates is either (i) selected by the networks, which material accounts for over 62% of the viewing time of affiliated stations (i.e., the time during which programs emanating from the particular channel assigned to a station by the FCC may be viewed on television screens) or is (ii) selected by the local stations, which material accounts for less than 38% of the viewing time of affiliated stations.

43. Of the approximately 38% of viewing time of the average affiliated station represented by locally-emanating program material, approximately 12% (or slightly under one-third of the 38%) is devoted to live programs (including its own local video-tape programs) selected and originated by the station, and approximately 26% (or slightly over two-thirds of the 38%) is devoted to pre-recorded programs selected and originated by the station.

44. The average television station not affiliated with a network devotes approximately 29% of its viewing time to live programs (including its own local video-tape programs) selected and originated by the station, and approximately 71% of its viewing time is devoted to pre-recorded programs selected and originated by the station.

45. In order to ascertain the percentage of revenue derived by local stations from pre-recorded programs, it would be necessary to have a set of records which would measure the economic value of such programs to the individual stations. The present financial arrangements between networks and their affiliates and between local stations and their advertisers do not make such measurement possible. The following economic factors would have to be considered:

(a) Revenue received by networks from the sale to advertisers of the right to have their advertising messages telecast over each affiliated station, and the part of that revenue paid by the networks to the individual stations;

(b) Revenue received by each station directly (or through advertising agencies) from the sale to advertisers of the privilege of telecasting "spot" announcements within or between network television programs (at times left unoccupied by the networks in accordance with their agreements with the affiliated stations) or between a network program and a program of local origin;

(c) Revenue received by each station from sale of the right to sponsor (or to participate in the

sponsorship of) programs of network origin that have not been sold to advertisers by the network (sometimes called "cooperative programs");

(d) Revenue received from sale of the right to sponsor (or to participate in the sponsorship of) programs of local origin, which would entail, for example:

(i) Apportionment, as between pre-recorded locally-emanating programs and other local programs, of the aggregate revenues received from sponsors for a package of programs, some of which were pre-recorded;

(ii) Apportionment, as between pre-recorded locally-emanating programs and network and other local programs, of revenues received from "spot" announcements appearing between pre-recorded local programs and network programs and between pre-recorded local programs and other local programs;

(iii) Apportionment, as between pre-recorded local programs and network and other local programs, of revenues received for "spot" announcements sold on a package basis with the individual station exercising considerable discretion as to the placement thereof in its programming.

46. In addition, the following factors relating to programming would have to be considered:

(a) Affiliated stations telecast network programs with relatively high audience ratings along with programs of relatively low audience ratings. Thus the dollar payments to the local stations under their network agreements generally cannot be analyzed on a basis that would accurately assess the economic value to the stations of any individual program;

(b) The proportion of the economic value created by network programs that is realized by network sales of time and the proportion realized by sales of local "spots" change periodically (e.g., the extension of station breaks from 30 seconds to 40 seconds);

(c) Local stations do not typically sell "spots" on an individual program basis. Generally, "spots" are sold to advertisers on a package basis. To correlate the dollars received from such sales with specific programs would be impossible;

(d) Sales of local "spots" are usually made in connection with discount plans. The terms of these plans are usually not related to specific programs;

(e) The practice of program promotion (inserting an advertisement for one program during an interval in the presentation of another program) has the economic significance of diverting advertising dollars from one program to another; but the dollar extent of that diversion is not reflected in the records of individual stations; and

(f) Stations and networks do not adhere in all cases to the rates appearing in their published card rates. Some sponsors are given special discounts or concessions not granted to others. In many cases rate concessions on one program are made in consideration of sponsoring other programs. Such considerations usually do not appear in the contracts between the sponsor and the station or network.

There would be no way to make a proper apportionment of revenue, in the light of all the above factors, as between pre-recorded programs and all other programs.

IV. IF PETITIONERS' APPLICATION IS GRANTED, INDEPENDENT COPYRIGHT OWNERS WOULD NOT HAVE FREE AND FAIR ACCESS TO PROGRAM PRODUCERS IN THE MARKETING OF PERFORMING RIGHTS BECAUSE PETITIONERS AND OTHER BROADCASTERS, ACTING COLLECTIVELY THROUGH BMI, HAVE TIED UP A LARGE SEGMENT OF THE TELEVISION PROGRAM MARKET THROUGH GUARANTEES TO MUSIC WRITERS AND PUBLISHERS AND SUBSIDIES TO PROGRAM PRODUCERS.

47. In a calculated and concerted campaign initiated in anticipation of this proceeding, the broadcasting industry has engrossed a substantial captive source of music and, through guarantees to music writers and publishers and subsidies to program producers, has foreclosed free access to a significant portion of television programming.

48. BMI, which was organized through the collective efforts of the entire broadcasting industry in 1939, provides the broadcasting industry (and those who supply it with pre-recorded programs) with its own large, captive source of copyrighted music that is available to the broadcasters in lieu of musical works which are licensed by individuals and organizations not controlled by the broadcasting industry and for the use of which the broadcasting industry would have to bargain in arms-length negotiations.

49. A majority of petitioners are owners of record of the stock of BMI, and among them petitioners (or companies affiliated with them in common ownership) own over 60% of the stock of BMI.

50. All the petitioners and all other broadcasters share the same benefits as these record stockholders and receive all the benefits derived by stockholders. These benefits include an assured ceiling on

the cost of music to the broadcasting industry because an increase in the use of BMI music means a corresponding decrease in the use of non-BMI music. A decrease in the use of non-BMI music would be calculated to reduce the payments by broadcasters for such music. BMI, on the other hand, has never increased its rate to broadcasters although, through artificial means, the use of BMI music by broadcasters has been greatly increased. In fact, BMI from time to time has rebated to broadcasters portions of their BMI fees or has reduced the rate to all broadcasters for the use of BMI music.

51. In order to emphasize the trust aspects of record ownership of BMI stock, the broadcasters, acting through the NAB (which, together with the networks and leading broadcasters, organized BMI), have agreed that no stockholder will transfer his BMI stock to anyone who is not a broadcaster, that no dividend will be declared, and that no stockholder of BMI will receive any financial benefits of stock ownership that are not available to all other broadcasters. BMI has not declared dividends to its stockholders of record inasmuch as its sole objective is to depress, through artificial means, the overall cost of music to all broadcasters. The purpose and effect of this arrangement are to constitute these record stockholders as trustees of their shareholdings for the entire broadcasting industry.

52. BMI is used by the broadcasting industry as a sharp edged bargaining tool for all broadcasters in their negotiations with writers and publishers of music who have not placed their works in the broadcaster-BMI pool.

53. In an effort to engross the television market for musical performances, the broadcasting industry, acting through BMI, has given large, long-term guarantees to music writers and publishers and substantial subsidies to performers, program producers and their personnel, and others in a position to select BMI music for television presentation.

54. BMI also gives publishers affiliated with record companies a 38% override on royalty payments, thereby artificially stimulating the volume of records of BMI music that are available for broadcast presentation. (See the typical BMI agreement with a publisher affiliated with a record company, a copy of which is submitted herewith as Exhibit 20.)

55. The power of petitioners to dominate the market for television program material has been further utilized in anticipation of the present proceedings in a campaign undertaken by BMI to control the music performed on pre-recorded television programs. Towards that end, BMI has induced many of respondent's members, including a large number who are primarily composers of background and theme music for television films, to resign from the Society and to license their works through BMI, in return for long-term and very substantial annual guaranteed payments. These payments are wholly independent of the number or quality of the works, if any, that subsequently may be composed by such writers or of any actual performances that may be made of their works on television, or whether a writer should survive for the entire term of the guarantee or die before its expiration. Among others receiving such guarantees are employees of producers who are charged with the responsibility of selecting the music for pre-recorded programs and who are thus predisposed to select BMI music.

56. The following are some of the former writer members of respondent who specialize in writing background and theme music for television program series and who are known to have received from BMI guarantees payable over five or ten-year periods in consideration for their transfer of affiliation from ASCAP to BMI:

Name	Year of Resignation	Amount of Guarantee
Gilbert, Herschel B.	1960	Over $ 200,000
Stevens, Leith	1960	150,000
Riddle, Nelson	1960	Over 100,000
Mullendore, Joe	1960	Over 100,000
Romolo, Pete	1960	100,000
Williams, John T.	1960	100,000
Friedhofer, Hugo	1960	90,000
Herrmann, Bernard	1959	90,000
Loose, William	1959	90,000
Mockridge, Cyril	1959	90,000
Wilson, Stanley J.	1960	90,000
Steiner, Fred	1960	90,000
Goldsmith, Jerrald	1960	90,000
Marshall, Jack	1960	90,000
Morton, Arthur	1960	70,000
Salinger, Conrad	1960	70,000
Seely, John	1959	70,000
Barker, Warren	1961	Amount Unknown
Burke, Sonny	1960	Amount Unknown
Cadkin, Emil	1959	Amount Unknown
Cookerly, Jack "C"	1959	Amount Unknown
Daniel, Eliot	1960	Amount Unknown
Frontiere, Dominic	1960	Amount Unknown
Hatch, Wilbur	1960	Amount Unknown
Meakin, Jack	1960	Amount Unknown
Perry, Alfred	1961	Amount Unknown
Schrager, Rudy	1960	Amount Unknown
Skiles, Marl[illegible]	1959	Amount Unknown

57. A copy of a typical agreement between BMI and a writer receiving a guarantee is submitted herewith as Exhibit 21. That agreement is dated May 17, 1960, and is effective upon the member's resignation from ASCAP. The contract runs for 10 years, and yearly guarantees are escalated from $3,000 for the first year to $11,000 for the tenth year, thus making it financially impossible for

the recipient to leave BMI during the contract period. ASCAP, of course, is forbidden from offering such guarantees by the Amended Final Judgment and the Further Amended Final Judgment, entered herein on March 14, 1950 and January 7, 1960, respectively.

58. Among those who receive BMI subsidies in the form of long-term guarantees is the President of the union known as the Composers and Lyricists Guild, Leith Stevens, who, as listed above, has been guaranteed $150,000. This union is the principal background music writers' association and the collective bargaining agent for such writers in their dealings with television program producers.

59. Also receiving BMI guarantees are the music supervisors for two of the leading producers of television program series (Four Star Television Films, Inc. and Revue Productions, Inc.) Both individuals are in a position to favor the use of BMI music in the many television program series produced by their two companies. The music supervisor of Four Star is Herschel B. Gilbert, who, as listed above, has been guaranteed an amount in excess of $200,000. The music supervisor of Revue, a subsidiary of Music Corporation of America, is Stanley J. Wilson, who, as listed above, has been guaranteed $90,000. (Revue and Four Star are also receiving BMI subsidies; see paragraph 63, infra.)

60. A number of major television program producers have been receiving substantial payments in cash or other consideration from the broadcasting industry, through BMI, in return for using specified amounts of the BMI-licensed music in the programs that they produce for television.

61. Among program producers receiving BMI subsidies is Goodson-Todman Productions, one of the largest producers of network programs, which received from BMI an advance of $100,000 to be used in recording BMI music abroad for use as background music in shows produced by Goodson-Todman. In addition, BMI has agreed to pay Goodson-Todman a minimum of $100,000 each year thereafter if during the preceding year at least 70% of the music on its programs is broadcaster-controlled (i.e., BMI) music.

62. A leading producer of television program series, Screen Gems, a subsidiary of Columbia Pictures, recently received a subsidy which, in effect, constituted a gift of a very large music publishing company owned by BMI and known as the BMI Publishing Company, Inc. The form of the gift was a sale by BMI to Screen Gems for a "price" which BMI agreed to repay to over a five-year period in the form of "royalties" for the use of music in this catalog by Screen Gems as a producer of television films. Screen Gems, in turn, agreed to incorporate enough BMI music in its television films to "earn" those "royalties."

63. One of the most powerful talent organizations in the world, Music Corporation of America, through its subsidiary, Revue, is receiving a substantial subsidy from BMI in return for its commitment to use BMI-licensed music in the many television program series that it produces. Four Star, another leading producer of television program series, is also receiving a large

subsidy from BMI in return for its agreement to use BMI music in its programs.

64. Revue, Screen Gems and Four Star are the leading three producers of pre-recorded programs scheduled for network presentation in the 1962-63 season. Revue will account for 9 hours per week of such programming, Screen Gems for 6 hours, and Four Star for 5 hours. Goodson-Todman is, by a wide margin, the most prolifi producer of live and taped network programs, with 15-1/2 hours of such programming now being presented weekly on the three networks. (See "Variety", April 11, 1962, p. [illegible].) .

65. Many programs produced by producers receiving BMI subsidies have been or will be presented by local television stations either as "reruns" after initial presentation by the networks or on a direct syndication basis.

66. As a progress report to the broadcasting industry, timed to coincide with the 1962 NAB annual convention in Chicago and describing the industry's success to date in engrossing the television market, BMI recently purchased identical two-page color advertisements in "Broadcasting," "Variety," "Billboard," and "Radio-TV Daily," the leading trade publications read and relied on by the broadcasting industry. These advertisements purported to describe "How BMI-licensed music is used in regularly scheduled TV network programs and in syndicated film series." (See, e.g., the advertisement in "Broadcasting," April 2, 1962, pp. 18-19, a copy of which is

submitted herewith as Exhibit 22.) The advertisements contain lists allegedly representing "those regular programs which use (have) BMI-licensed music in every show." Separate lists were set forth for each of the three national television networks (CBS, ABC and NBC) and for syndicated film series telecast locally.

67. In the brief time since these advertisements first appeared, respondent has been able to make only a preliminary analysis of the programs listed by BMI under the three television networks. Even this preliminary analysis indicates, however, the extent to which the above-described concerted activities of the broadcasting industry, carried out through the instrument of BMI, have foreclosed the television market place from free and fair competitive access by independent music writers and publishers.

68. Thus, of the 35 programs listed under CBS as allegedly using BMI music "in every show," at least 27 (or 77%) are programs for which music has been written by former ASCAP members who were induced by the broadcasting industry through long-term guarantees and other means to resign from ASCAP and to license their works through BMI. At least 9 of the 35 programs listed under CBS were produced or packaged by organizations known by respondent to be receiving substantial subsidies from BMI.

69. Of the 29 programs listed under ABC as allegedly using BMI music "in every show," at least 22 (or 76%) are programs for which music has been written by former ASCAP members who were induced by the broadcasting

industry through long-term guarantees and other means to resign from ASCAP and to license their works through BMI. At least 9 of the 29 programs listed under ABC were produced or packaged by organizations known by respondent to be receiving substantial subsidies from BMI.

70. Of the 26 programs listed under NBC as allegedly using BMI music "in every show," at least 16 (or 62%) are programs for which music has been written by former ASCAP members who were induced by the broadcasting industry through long-term guarantees and other means to resign from ASCAP and to license their works through BMI. At least 7 of the 26 programs listed under NBC were produced or packaged by organizations known by respondent to be receiving substantial subsidies from BMI.

71. If performing rights for works in the ASCAP repertory were required to be licensed by individual ASCAP writers and publishers to the producers of television programs rather than by the Society to the television stations that present those programs, the individual writers and publishers who are not recipients of BMI subsidies would find themselves at an impossible competitive disadvantage because (a) the broadcasters, through arrangements made by BMI, which they tenaciously retain as a fighting arm for the entire broadcasting industry, have the power to control the television program market and (b) many program producers would not pay money out for the right to include non-BMI music in their programs when

those producers and their personnel are now taking in money from the broadcasters, through BMI, for including BMI music in their programs.

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